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CONTRIBUTORS OF ARTICLES

ARORA, R. S. Rise of the Public Corporation in India: Some Constitutional Aspects 362

BORRIE, Gordon. The Wedgwood Benn Case 349

CAMPBELL, Enid. The Prerogative Power of Dissolution: Some Recent Tasmanian Precedents 165

CHOWDHURY, Subrata Roy. Cultural and Educational Rights of Indian Minorities as Judicially Interpreted 271

CRAIG, James T. The Reluctant Executive 45

DUNSIRE, A. The Passing of the Ministry of Transport and Civil Aviation 150

GARNER, J. F. London Government and its Reform 256

GAUDEMET, P. M. La Loi dans la Constitution de 1958 386

MARSHALL, G. Parliament and the Prerogative of Mercy 8

PARRIS, Henry. The Home Office and the Provincial Police in England and Wales—1856–70 230

RICHARDS, Peter G. The Selection of Justices of the Peace 134

SAWER, G. Federalism in West Germany 26

PARLIAMENTARY PAPERS 1960–61

UNITED KINGDOM

[All references to H.C. and H.L. Papers are to the 1960–61 Session unless otherwise stated]

Courts

Cmnd. 1289. Interdepartmental Committee on the Business of the Criminal Courts, report 180
Cmnd. 1408. Civil Judicial Statistics (Scotland) for 1960 398
Cmnd. 1416. Civil Judicial Statistics for 1960 398
H.C. 81. Legal Aid (Scotland) Fund, report for 1959–60 180
H.C. 208. Legal Aid Fund, account for 1959–60 289

Education

Cmnd. 1166. University Grants Committee, returns from universities and colleges 76
Cmnd. 1245, 1254. Technical Education in Scotland, reports 181
Cmnd. 1359. Education in Scotland, report 290
H.C. 269. Teachers' Superannuation Scheme, report of Government Actuary 399

Government Functions and Appointments

Cmnd. 1167. Advisory Committee on Scientific Policy, report for 1959–60 77
Cmnd. 1206. Post Office, report and accounts for 1959–60 76
Cmnd. 1207. Ministry of Health, report for 1959, Part II 76
Cmnd. 1258. Commissioners of the Inland Revenue, report for 1959–60 182
Cmnd. 1288. Defence, report for 1961 182
Cmnd. 1311. Agriculture, annual review 181
Cmnd. 1315. Agriculture in Scotland, report for 1960 181
Cmnd. 1320, 1321. Department of Health for Scotland, report for 1960, Parts I and II 291
Cmnd. 1362. Agricultural Research Council, report for 1959–60 292
Cmnd. 1364. Ministry of Labour, report for 1960 291
Cmnd. 1365. Department of Scientific and Industrial Research, report for 1960 292
Cmnd. 1390. Inspector of Constabulary for Scotland, report for 1960 291
Cmnd. 1418. Ministry of Health, report for 1960, Part I 401
Cmnd. 1420. Inspector of Fire Services in Scotland, report for 1960 400
Cmnd. 1432. Committee on Control of Public Expenditure, report ... 399
Cmnd. 1435. Ministry of Housing and Local Government, report for 1960 401
Cmnd. 1439. Ministry of Education, report for 1960 401
Cmnd. 1447. Chief Inspector of Fire Services, report for 1960 400
Cmnd. 1458. Ministry of Pensions and National Insurance, report for 1960 401
Cmnd. 1478, 1479. Chief Inspector of Factories, reports for 1960 ... 399
H.C. 43, 68. National Research Development Corporation, report and accounts for 1959–60 182
H.C. 126. National Land Fund, account for 1959–60 182

H.C. 145. Agricultural Research Fund, account for 1959–60 182
H.C. 159. Agricultural Land Commission, accounts for 1959–60 290

Housing

Cmnd. 1205. Housing Return for Scotland 78
Cmnd. 1208. Housing Return for England and Wales 78
Cmnd. 1228. Housing Summary 78
Cmnd. 1269. Housing Return for Scotland 184
Cmnd. 1271. Housing Return for England and Wales 184
Cmnd. 1283. Rents of Local Authority Houses in Scotland 183
Cmnd. 1290. Housing in England and Wales, proposals 183
Cmnd. 1296. Housing Summary 184
Cmnd. 1348. Housing Return for England and Wales 293
Cmnd. 1349. Housing Return for Scotland 293
Cmnd. 1419. Housing Summary 293
Cmnd. 1442. Housing Return for Scotland 403
Cmnd. 1443. Housing Return for England and Wales 403
Cmnd. 1480. Housing Summary 403
H.C. 148. Accounts under the House Purchase and Housing Act, 1959 293

Local Government

Cmnd. 1164. Royal Commission on Local Government in Greater London, report 79
Cmnd. 1222. Royal Commission on the Police, interim report 82
Cmnd. 1440. Commissioner of Police for the Metropolis, report 409
H.C. 15. Ministry of Housing and Local Government, report on the General Grant Order, 1960 78
H.C. 155. Local Loan Funds, accounts for 1959–60 294

Monopolies and Restrictive Practices

Cmnd. 1273. Registrar of Restrictive Trading Agreements, report ... 187
H.C. 122. Monopolies Commission, references 187
H.C. 218. Monopolies Commission, report on cigarettes and tobacco 412

National Health Service

H.C. 124. Hospital Boards, Dental Estimates Board, accounts for 1959–60 187
H.C. 125. Hospital Boards, Dental Estimates Board (Scotland), accounts for 1959–60 187
H.C. 250. Central Health Services Council, report for 1960 414

National Insurance

Cmnd. 1196. Proposed changes in the National Insurance Schemes ... 85
Cmnd. 1197. Financial Provisions of the National Insurance Bill, report of Government Actuary 85
Cmnd. 1384. Pension Increments for Wives and Widows, report of National Insurance Advisory Committee 302
H.C. 21. Mariners, report of National Insurance Advisory Committee 193
H.C. 44, 45. Non-Participation, reports of National Insurance Advisory Committee 193
H.C. 139. Classification, report of National Insurance Advisory Committee 190
H.C. 156. Retirement Benefit, report of National Insurance Advisory Committee 303
H.C. 157. Graduated Contributions, report of National Insurance Advisory Committee 301

H.C. 170. National Insurance Fund, accounts 301
H.C. 203. Contributions, report of National Insurance Advisory Committee 301
H.C. 222. National Insurance, report by Government Actuary for 1959–60 303

National Insurance (Industrial Injuries)

H.C. 217. National Insurance (Industrial Injuries) Acts, report by Government Actuary for 1959–60 303

Nationalised Industries

Cmnd. 1248. Proposals for reorganisation of nationalised transport undertakings 88
Cmnd. 1337. Nationalised Industries, financial and economic obligations 305
H.C. 226 (1959–60). B.T.C., report and accounts for 1959 88
H.C. 254, 254–I (1959–60). British Railways, report and evidence of Select Committee on Nationalised Industries 88, 307
H.C. 278 (1959–60). Air Transport Advisory Council, report for 1959–60 88
H.C. 319–331 (1959–60). Gas Corporations and Consultative Councils, report and accounts for 1959–60 88
H.C. 339 (1959–60). Air Corporations, special report of Select Committee on Nationalised Industries 88
H.C. 342, 343 (1959–60). Guarantees on loans, Airways Corporations 88
H.C. 344, 346, 347 (1959–60). Guarantees on loans, Electricity Corporations 88
H.C. 345 (1959–60). Guarantee on loans, Gas Council 88
H.C. 348 (1959–60). Guarantee on loans, B.T.C. 88
H.C. 37, 79. Electricity and Gas corporations, accounts of advances for 1959–60 196
H.C. 46, 47, 171, 172, 273, 274. Guarantees on loans, Airways Corporations 196, 306, 419
H.C. 56, 58, 59, 173, 175, 176, 275, 277, 278. Guarantees on loans, Electricity Corporations 196, 306, 420
H.C. 57, 174, 276. Guarantees on loans, Gas Council 196, 306, 420
H.C. 62, 177, 279. Guarantees on loans, B.T.C. 196, 307, 420
H.C. 77. National Coal Board, accounts of advances for 1959–60 ... 196
H.C. 110, 130. Scottish Electricity Boards, reports and accounts for 1960 196
H.C. 147. B.O.A.C. and B.E.A., accounts of advances for 1959–60 ... 195
H.C. 151, 152, 153. Transport Consultative Committees, reports for 1960 307
H.C. 163. British Railways, special report of Select Committee on Nationalised Industries 307
H.C. 182. U.K. Atomic Energy Authority, Balance Sheet for 1959–60 306
H.C. 183. B.T.C., accounts of advances for 1959–60 307
H.C. 195, 196. National Coal Board, report and accounts for 1960 ... 306
H.C. 213, 213–I. B.T.C., report and accounts for 1960 307
H.C. 229. Atomic Energy Authority, report for 1960–61 419
H.C. 249. Coal Consumers' Councils, report for 1960–61 419
H.C. 257, 258. B.E.A., B.O.A.C., report and accounts for 1960–61 ... 419
H.C. 280, 280–I. Gas Industry, report of Select Committee on Nationalised Industries 420

Parliament

H.L. (26–I) (69–I), H.C. 191–I. Land Compensation Bill, report of Joint Committee 307

H.L. (26–II) (71–I), H.C. 202–I. Factories Bill, report of Joint Committee 307
H.L. (48) (83) (138). Select Committee on House of Lords Offices, second, third and fourth reports 197, 308
H.L. (129). Select Committee on House of Lords procedure, first report 421
H.C. 258, 259, 274 (1959–60). Estimates Committee, second, third and fourth reports 89
H.C. 9, 10, 11, 26, 30, 91, 129, 210, 246, 285. Estimates Committee, first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh special reports 89, 197, 307, 420
H.C. 75. House of Commons Members' Fund, report for 1959–60 ... 197
H.C. 103, 228, 252. Public Accounts Committee, first, second and third reports 198, 309, 421
H.C. 128, 168, 184, 232, 233, 241, 245, 284. Estimates Committee, first, second, third, fourth, fifth, sixth, seventh and eighth reports 197, 307, 420
H.C. 136. House of Commons Members' Fund, accounts for 1959–60 197
H.C. 142. Committee of Privileges, report on the Wedgwood Benn case 198
H.C. 51–I, 219–I, 256–I (1959–60). Public Accounts Committee, special report and first and second reports 89

Public Authorities

Cmnd. 1270, 1294, 1436. Iron and Steel Holdings and Realisation Agency, Treasury Minutes 198, 421
Cmnd. 1336. Royal Fine Art Commission, report for 1959–60 310
Cmnd. 1366. Herring Industry Board, report for 1960 309
Cmnd. 1398. National Film Finance Corporation, report and accounts for 1960–61 310
Cmnd. 1410. National Assistance Board, report for 1960 310
Cmnd. 1435. New Towns, report of Ministry of Housing and Local Government 422
Cmnd. 1441. British Phosphate Commission, report and accounts for 1960–61 421
H.C. 269 (1959–60). Board of Control, report for 1959–60 90
H.C. 287 (1959–60). New Towns, reports for 1959–60 90
H.C. 334 (1959–60). Agricultural Land Commission, report for 1959–60 89
H.C. 25. Iron and Steel Holding and Realisation Agency, report and accounts for 1959–60 90
H.C. 38. Iron and Steel Holding and Realisation Agency, accounts ... 198
H.C. 116. White Fish Authority, accounts for 1959–60 199
H.C. 127. Sugar Board, accounts for 1959–60 199
H.C. 138. New Towns, accounts for 1959–60 199
H.C. 164. Iron and Steel Board, special report on development 309
H.C. 204, 205, 206. Historic Buildings Council, reports for 1960 309
H.C. 214. Iron and Steel Board, report for 1960 309
H.C. 216. Ancient Monuments Boards, reports 309
H.C. 219. Iron and Steel Board, Statement on Chairman's remuneration 309
H.C. 234. White Fish Authority, report and accounts for 1960–61 ... 310
H.C. 272. New Towns, reports for 1960–61 422
H.C. 283. Sugar Board, report and accounts for 1960–61 422

Subordinate Legislation

H.L. (5) (17) (21) (33) (38) (44) (51) (59) (78) (93) (109) (124) (133). Special Orders Committee, reports 91, 200, 311, 422

H.C. 5, 5–II, 5–III, 5–IV, 5–V, 5–VI, 5–VII, 5–VIII, 5–IX, 5–X, 5–XI, 5–XII, 5–XIII, 5–XIV, 5–XV, 5–XVI, 5–XVII, 5–XVIII, 5–XIX, 5–XX, 5–XXI, 5–XXII. Select Committee on Statutory Instruments, reports 91, 200, 310, 422

Town and Country Planning

H.L. (47). Compensation, Lord Chancellor's proposals 201
H.C. 109. Accounts (Scotland) 200
H.C. 117. Accounts 201

Tribunals

Cmnd. 1382. Scottish Land Court, report for 1960 428

Wales

Cmnd. 1293. Report on development and Government action 202
Cmnd. 1331. Welsh Advisory Water Committee, report 313

Wireless and Television

Cmd. 1174. B.B.C., report and accounts for 1959–60 ..... 95, 202
H.C. 1. I.T.A., report and accounts for 1959–60 95
H.C. 187. I.T.A., accounts 313

COMMONWEALTH AND DEPENDENT TERRITORIES

Cmnd. 1148, 1149, 1150, 1151. Rhodesia and Nyasaland, reports and evidence of Advisory Commission 101
Cmnd. 1159. Bechuanaland Protectorate, proposed constitution 95
Cmnd. 1190. Ghana, appeals to the Privy Council 99
Cmnd. 1215. Colonial Research, reports 95
Cmnd. 1255. Committee on Legal Education for students from Africa, report 203
Cmnd. 1261. Malta, report of the Blood Commission 209
Cmnd. 1291. Southern Rhodesia, report of Constitutional conference 216
Cmnd. 1295, 1301. Northern Rhodesia, proposals for Constitutional change 211
Cmnd. 1360. Tanganyika, report of Constitutional conference 327
Cmnd. 1399, 1400. Southern Rhodesia, proposed constitution 321
Cmnd. 1407. Colonial territories, report for 1960–61 314
Cmnd. 1409. Exchange of Notes on relations between U.K. and Kuwait 432
Cmnd. 1417. West Indies, report of Constitutional conference 328
Cmnd. 1423. Northern Rhodesia, proposals for Constitutional change 320
Cmnd. 1434. Leeward and Windward Islands, report of Constitutional conference 440
Cmnd. 1449. Britain's relations with E.E.C., talks with Commonwealth governments 429
Cmnd. 1459. Release of Jomo Kenyatta, dispatch from Governor of Kenya 432
Cmnd. 1464. Exchange of letters between U.K. and Sierra Leone ... 436
Cmnd. 1469. Gambia, report of Constitutional conference 430
H.C. 72. Colonial development, accounts 203
H.C. 199. Colonial Development Corporation, report and accounts ... 314
H.C. 240. Colonial development, return of schemes 428
H.C. 264. British Guiana, guarantee on loans 429

GOVERNMENT CIRCULARS

Ministry of Education, No. 11/60 76

Ministry of Health, No. E.C.L. 53/61 300

Ministry of Housing and Local Government—

No. 53/60 86
No. 54/60 93
No. 62/60 201
No. 2/61 193
No. 9/61 193
No. 11/61 293
No. 16/61 298
No. 21/61 295
No. 34/61 423
No. 35/61 404
No. 37/61 404
No. 39/61 412
No. 42/61 404
No. 46/61 411

Scottish Home Department—

No. 9677 86
No. 9765 193

BOOK REVIEWS

Aron, Raymond. France, the New Republic 119
Basu, Durga Das. Introduction to the Constitution of India 117
Birks, Michael. Gentlemen of the Law 223
Castberg, Frede. Freedom of Speech in the West 117
Cross, C. A. and Garner, J. F. Highway Law 333
de Smith, S. A. The Lawyers and the Constitution 444
Ebsworth, Raymond. Restoring Democracy in Germany—the British Contribution 223
Garner, J. F. The Law of Sewers and Drains (2nd ed.) 331
Hryniewiecki, J. and Starewicz, A. (Ed.) The Polish Diet 120
Jackson, R. M. The Machinery of Justice in England (3rd ed.) 331
Jennings, Sir Ivor. Party Politics, vol. 1: Appeal to the People 114
Jennings, Sir Ivor. Principles of Local Government Law (4th ed.) 332
Pierson, Coen G. Canada and the Privy Council 116
Sheppard, F. H. W. Local Government in St. Marylebone 1688–1835 ... 115
Sheridan, L. A. Malaya and Singapore: The Borneo Territories 445
Thomas, Helen Shirley. Felix Frankfurter: Scholar on the Bench 333
The Oxford Lawyer, Vol. 3, No. 2 331

STATUTES

[*Only statutes substantially discussed or reported are included*]

1960	Administration of Justice Act (8 & 9 Eliz. 2, c. 65)	90
	Professions Supplementary to Medicine Act (8 & 9 Eliz. 2, c. 66)	94
	Public Bodies (Admission to Meetings) Act, (8 & 9 Eliz. 2, c. 67)	81
	Administration of Justice (Judges and Pensions) Act (9 Eliz. 2, c. 3)	75
	National Insurance Act (9 Eliz. 2, c. 5)	85
	Ministers of the Crown (Parliamentary Secretaries) Act (9 Eliz. 2, c. 6)	76
1961	Electricity (Amendment) Act (9 & 10 Eliz. 2, c. 8)	196
	Diplomatic Immunities (Conferences with Commonwealth Countries and the Republic of Ireland) Act (9 & 10 Eliz. 2, c. 11)	203
	National Health Service Contributions Act (9 & 10 Eliz. 2, c. 13)	299
	Nurses (Amendment) Act (9 & 10 Eliz. 2, c. 14)	312
	Post Office Act (9 & 10 Eliz. 2, c. 15)	291
	Sierra Leone Independence Act (9 & 10 Eliz. 2, c. 16)	324
	White Fish and Herring Industries Act (9 & 10 Eliz. 2, c. 18)	310
	National Health Service Act (9 & 10 Eliz. 2, c. 19)	299
	Home Safety Act (9 & 10 Eliz. 2, c. 20)	295
	Republic of South Africa (Temporary Provisions) Act (9 & 10 Eliz. 2, c. 23)	326
	Private Street Works Act (9 & 10 Eliz. 2, c. 24)	292
	Rural Water Supplies and Sewerage Act (9 & 10 Eliz. 2, c. 29)	298
	Department of Technical Co-operation Act (9 & 10 Eliz. 2, c. 30)	291
	Local Authorities (Expenditure on Special Purposes) (Scotland) Act (9 & 10 Eliz. 2, c. 32)	291
	Land Compensation Act (9 & 10 Eliz. 2, c. 33)	423
	Police Pensions Act (9 & 10 Eliz. 2, c. 35)	297
	Consumer Protection Act (9 & 10 Eliz. 2, c. 40)	404
	Sheriffs' Pensions (Scotland) Act (9 & 10 Eliz. 2, c. 42)	412
	Public Authorities (Allowances) Act (9 & 10 Eliz. 2, c. 43)	403
	Rivers (Prevention of Pollution) Act (9 & 10 Eliz. 2, c. 50)	411
	Police Federation Act (9 & 10 Eliz. 2, c. 51)	409
	Rating and Valuation Act (9 & 10 Eliz. 2, c. 53)	406
	Crown Estate Act (9 & 10 Eliz. 2, c. 55)	398
	Highways (Miscellaneous Provisions) Act (9 & 10 Eliz. 2, c. 63)	401
	Public Health Act (9 & 10 Eliz. 2, c. 64)	409
	Lancashire Quarter Sessions Act (9 & 10 Eliz. 2, c. xiv)	289

STATUTORY INSTRUMENTS

1960

1103. National Insurance (Non-Participation—Assessment of Equivalent Pension Benefits) Regulations 85
1395. Legal Aid (Scotland) (Assessment of Resources) Regulations 75
1471. Legal Aid (Assessment of Resources) Regulations 75
1761. Town and Country Planning (Use Classes) (Amendment No. 2) Order 93
1885. Agriculture (Areas for Agricultural Land Tribunals) (Amendment) Order 93
1934. General Optical Council (Disciplinary Committee Rules) Order in Council 94
1935. General Optical Council (Investigating Committee Rules) Order in Council 94
1959. Sierra Leone Protectorate (Amendment) (No. 2) Order in Council 110
1960. Sierra Leone (Constitution) (Amendment) (No. 2) Order in Council 110
1961. Trinidad and Tobago (Electoral Provisions) Order in Council ... 112
1962. North Borneo and Sarawak (Alteration of Boundaries) Order in Council 100
1965. East Africa (High Commission) (Amendment) Order in Council ... 111
2014. Town and Country Planning (Use Classes) (Scotland) Amendment Order 93
2056. Legal Aid and Advice Act, 1949 (Commencement No. 9) Order ... 75
2057. Legal Aid (General) (Amendment No. 3) Regulations 75
2092. Legal Aid (Scotland) Act, 1949 (Commencement No. 5) Order ... 75
2162. Judicial Offices (Salaries) Order 75
2194. Legal Aid (Scotland) (Assessment of Resources) Amendment Regulations 76
2195. Legal Aid (Scotland) (General) Regulations 76
2196. Local Government (General Grant Transitional Adjustments) (Scotland) Regulations 78
2201. Kenya (Constitution) (Amendment No. 2) Order in Council 100
2210. Nyasaland (Electoral Provisions) Order in Council 110
2214. Aliens Order 181
2215. British Nationality (Cyprus) Order 99
2230. National Insurance (Modification of Teachers Superannuation Acts) Regulations 85
2284. Local Government (Compulsory Purchase) Regulations 93
2292. General Grant Order 78
2293. Grants and Rates (Transitional Adjustments) Regulations 78
2324. General Grant (Scotland) Order 78
2369. Legal Aid (General) (Amendment No. 4) Regulations 75
2412. British Guiana (Electoral Provisions) Order in Council 206
2416. Bechuanaland Protectorate (Constitution) Order in Council ... 205, 316
2417. Basutoland, Bechuanaland Protectorate and Swaziland (office of High Commissioner) (Amendment No. 2) Order in Council ... 205
2421. National Insurance Act, 1960 (Commencement) Order 85
2422. National Insurance (Increase of Benefits and Miscellaneous Pensions) Regulations 190
2429. National Insurance (Married Women) Amendment Regulations 193
2430. National Insurance (Industrial Injuries) (Increase of Benefits and Miscellaneous Provisions) Regulations 193

2431. National Insurance (Mariners) Amendment Regulations 192
2433. Town and Country Planning (Grants) (Scotland) Regulations 92
2438. National Health Service (Constitution of Standing Advisory Committees) (Scotland) Amendment Order 190
2439. National Health Service (Scottish Health Services Council and Standing Advisory Committees) Amendment Regulations 190
2447. Legal Aid (Scotland) (Remuneration) Regulations 180

1961

21. National Insurance (Modification of Local Government Superannuation Schemes) Regulations 193
34. National Health Service (Functions of Regional Hospital Boards, etc.) Regulations 189
59. Sovereign Bases of Akrotiri and Dhekelia (Appeals to Privy Council) Order in Council 207
61. Emergency Powers (Amendment) Order in Council 206
62. Uganda (Amendment) Order in Council 221
125. National Health Service (Functions of Regional Hospital Boards) (Scotland) Amendment Regulations 189
137. National Insurance (Non-Participation Benefits and Schemes) Amendment Regulations 193
138. National Insurance (Non-Participation—Continuity of Employment) Regulations 193
153. Tribunals and Inquiries (Air Operators' Certificates) Order 202
195. Town and Country Planning (Control of Advertisements) (Scotland) Regulations 200
202. British Nationality Regulations 207
383. National Insurance (Industrial Injuries) (Insurable and Excepted Employments) Amendment Regulations 195
405. National Insurance (Modification of Local Government Superannuation Schemes) No. 2 Regulations 193
420. National Insurance (Classification) Amendment Regulations 190
554. Legal Aid and Advice Act, 1949 (Commencement No. 10) Order 289
555. Legal Aid (Assessment of Resources) (Amendment) Regulations ... 289
556. Legal Aid (General) (Amendment) Regulations 289
557. National Insurance (Graduated Retirement Benefit and Consequential Provisions) Regulations 303
571. Jamaica (Constitution) (Amendment) Order in Council 319
584. National Insurance and Industrial Injuries (Turkey) Order 303
598. National Insurance (Collection of Graduated Contributions) Amendment Regulations 301
602. National Insurance (Industrial Injuries) (Colliery Workers Supplementary Scheme) Amendment Order 303
691. National Insurance (Industrial Injuries) (Prescribed Diseases) Amendment Regulations 304
737. East Africa (High Commission) (Temporary Provisions) Order in Council 318
738. Tanganyika Order in Council 327
739. Tanganyika (Public Service Commission) (Amendment) Order ... 327
740. Tanganyika (Legislative Council) (Amendment) Order in Council 327
742. Sierra Leone (Procedure in Appeals to Privy Council) Order in Council 325
743. Gambia Court of Appeal Order in Council 318
744. Gambia (Appeals to Privy Council) Order in Council 319
745. Superannuation (Teachers and Public Boards) Amending Rules ... 290
751. National Health Service (Employers of Mariners Contributions) Amendment Regulations 300

757. National Health Service (Appointment of Boards of Management —Consequential Provisions) (Scotland) Order 300
770. Superannuation (Local Government and Overseas Employment) Interchange (Amendment) Rules 298
836. Organisation for Economic Co-operation and Development (Immunities and Privileges) Order 291
867. National Insurance (Contributions) Amendment Regulations 301
976. Caravan Sites (Exemption for Licensing) (Scotland) Order 311
988. House of Commons Members' Fund Order 308
996. Northern Rhodesia Order in Council 321
997. Southern Cameroons (Constitution) (Amendment) Order in Council 316
998. Northern Cameroons (Administration) (Amendment) Order in Council 316
1000. European Free Trade Area (Immunities and Privileges) Order 290
1016. Patents Appeal Tribunal (Amendment) Rules 313
1162. Commission for the New Towns (Appointed Day) Order 310
1188. British Guiana (Constitution) Order in Council 429
1189. Nyasaland (Constitution) Order in Council 435
1192. Trinidad and Tobago (Constitution) Order in Council 443
1193. Uganda (Amendment No. 2) Order in Council 437
1194. Commonwealth Countries and the Republic of Ireland (Immunities) Order 428
1201. Professions Supplementary to Medicine Act, 1960 (Commencement No. 1) Order 427
1202. Family Allowances, National Insurance and Industrial Injuries (Germany) Order 417
1239. General Optical Council Disciplinary Committee (Legal Assessor) Rules 427
1295. Town and Country Planning (Atomic Energy Establishments Special Development) Order 422
1331. General Nursing Council Disciplinary Committee (Legal Assessor) (Scotland) Rules 427
1398. National Health Service (Superannuation) (Scotland) Regulations 414
1441. National Health Service (Superannuation) Regulations 414
1491. Legal Aid (Scotland) Act, 1949 (Commencement) (No. 6) Order ... 398
1500. British Protectorate (Geneva Conventions) (Amendment) Order in Council 443
1501. Department of Technical Co-operation Order 400
1504. Southern Cameroons (Constitution) (Amendment No. 2) Order in Council 429
1505. Tonga (Amendment) Order in Council 437
1506. Western Pacific (Courts) Order in Council 443
1507. Zanzibar Order in Council 443
1508 Diplomatic Immunities (Conferences) (Cyprus) Order 430
1513. National Insurance (Germany) Order 417
1520. Nurses Rules Approval Instrument 427
1521. Treasury (Loans to Local Authorities) (Interest) (No. 2) Minute ... 405
1549. Act of Sederunt (Legal Aid Rules) (Amendment) 398
1566. Superannuation (Teaching and Public Boards) (Scotland) Rules ... 399
1597. General Nursing Council Disciplinary Proceedings (Legal Assessor) Rules 427
1652. Acquisition of Land (Rate of Interest after Entry) Regulations ... 423
1653. Acquisition of Land (Rate of Interest after Entry) (Scotland) Regulations 423
1755. Agricultural Land Tribunals (Amendment) Order 425

TABLE OF CASES

[*Only cases substantially discussed or reported are included*]

Annamunthodo *v.* Oilfield Workers' Trade Union (1961) 427
Associated Transformer Manufacturers' Agreement, *Re* (1961) 299
Att.-Gen. *v.* Harris (1961) 199
—— *v.* St. Ives R.D.C. (1961) 186
Att.-Gen. of Gambia *v.* N'Jie (1961) 319

Black Bolt and Nut Association's Agreement, *Re* (1961) 414
British Bottle Association's Agreement, *Re* (1961) 299
British Transport Commission *v.* Hingley (1961) 186
Buncombe *v.* Baltic Sawmills Co. (1961) 407
Butterley Co. *v.* Tasker (1961) ... 185

Cane *v.* Royal College of Music (1960) 185
Carmarthenshire County Council, Ammanford No. 2 Division Election Petition, *Re* (1961) ... 294
Cement Makers' Federation's Agreement, *Re* (1961) 298
Ching Garage, Ltd. *v.* Chingford Corporation (1960) 77, 182
Clayton *v.* Kingston-upon-Hull Corporation (1961) 184

Dennis Hotels Pty., Ltd. *v.* State of Victoria (1961) 315
Doncaster and Retford Co-operative Societies' Agreement, *Re* (1960) 82
Dorking and Horley R.D.C. *v.* Fry (1960) 92

Edwick *v.* Sunbury-on-Thames U.D.C. (1961) 424

Farmers' Machinery Syndicate (11th Hampshire) *v.* Shaw (1961) 185
Fawcett Properties, Ltd. *v.* Buckinghamshire County Council (1960) 92

George Cohen 600 Group *v.* Minister of Housing and Local Government (1961) 425

Hamblett *v.* Flintshire County Council (1960) 92
Holmes, *Re* (1960) 91

Institute of Mechanical Engineers *v.* Cane (1960) 79
Iveagh (Earl of) *v.* Minister of Housing and Local Government (1961) 423

Jewish Blind Society Trustees *v.* Henning (1961) 184

Katikiro of Buganda *v.* Att.-Gen. (1960) 112
Kent *v.* Guildford R.D.C. (1959) 93
Kingston-upon-Hull Corporation *v.* Clayton (1961) 407

Land Commissioners *v.* Pillai (1960) 90
Leach *v.* Litchfield (1960) 83
Linoleum Manufacturers' Association's Agreement, *Re* (1961) 413
Local Government Election for the Rural District of Hambledon, *Re* (1961) 293
London and Westcliff Properties *v.* Minister of Housing and Local Government (1961) 201

Margate Corporation *v.* Roach (1960) 77
Morecambe and Heysham Corporation *v.* Robinson (1961) 185
Motor-Vehicles Distribution Scheme Agreement, *Re* (1961) 187

Newspaper Proprietors' Association's Agreement, *Re* (1961) ... 414

Parker *v.* Ealing Borough Council (1960) 79
Parkin *v.* London County Council (1961) 407

Parliamentary Election for Bristol South East, *Re* (1961) 349–361, 420
Parrish *v.* Minister of Housing and Local Government (1961) 423

R. *v.* Chertsey Justices, *ex p.* Franks (1961) 199
—— *v.* Haverfordwest Licensing Justices (1961) 199
Reinforcement Conference Members' Application (1961) 413
Ridge *v.* Baldwin (1961) 297
Riordan *v.* War Office (1960) ... 76
Routh's Trustees *v.* Central Land Board (1960) 92

Sneyd, *Re*, Robertson-MacDonald *v.* Sneyd (1961) 311
Solihull Corporation *v.* Gas Council (1961) 185
Southend-on-Sea Corporation *v.* Hodgson (1961) 294
Sussex Caravan Parks, Ltd. *v.* Richardson (1961) 186

Ware U.D.C. *v.* Gaunt (1960) ... 77
Warwick R.D.C. *v.* Miller-Mead (1961) 409
Wholesale Confectioners' Alliance's Agreement, *Re* (1961) 83, 298
Wolverhampton Local Government Election Petition, *Re* (1961) 405

Yarn Spinners' Agreement, *Re* (No. 2) (1960) 83

PUBLIC LAW

Spring, 1961

COMMENT

ON August 4, 1960, the House of Commons of Canada passed a most remarkable Bill which became law on August 10. Part I, the text of which is given here, provides for the establishment of a Bill of Rights for Canada.[1]

AN ACT FOR THE RECOGNITION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Preamble

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Recognition and declaration of rights and freedoms

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

1 Part II defines the law of Canada as here meaning matters that come within the legislative authority of the Parliament of Canada and also amends the War Measures Act, which is similar to our Emergency Powers Act, 1920.

(*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
(*b*) the right of the individual to equality before the law and the protection of the law;
(*c*) freedom of religion;
(*d*) freedom of speech;
(*e*) freedom of assembly and association; and
(*f*) freedom of the press.

Construction of law

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;
(*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;
(*c*) deprive a person who has been arrested or detained
  (i) of the right to be informed promptly of the reason for his arrest or detention,
  (ii) of the right to retain and instruct counsel without delay, or
  (iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;
(*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;
(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
(*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
(*g*) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

Duties of Minister of Justice

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Short title

4. The provisions of this Part shall be known as the *Canadian Bill of Rights.*

One's first impression on reading this is that its broad propositions are the kind of thing that one expects to find in a written constitution, where they would be fundamental law backed by provisions for judicial review. In fact it is nothing of the kind. These provisions do not purport to fetter future legislation and are quite compatible with a system accepting the legal sovereignty of the Queen in Parliament. In a sense the Act does establish a number of propositions which could be called " fundamental law " in the way that the term was used in the seventeenth century. My comments on it here are entirely from an English standpoint. Suppose that the Parliament at Westminster passed a similar Act, how would it fit in with our constitutional and legal ways of thought, and how might it work out in practice?

What it seems to do is to put into legislative form the broad way in which our common law has developed. Lawyers suppose that there are certain legal principles that are of supreme importance. In the seventeenth century they would have been called fundamental law, and the binding force would have been asserted by various appeals to the law of nature, of reason, and to anything else that was currently thought to support the particular contention. Unfortunately a substantial amount of royal prerogative was by common law historically the property of that feudal lord the King, and it was just as much protected by fundamental law as the rights of lesser property owners. It seems clear that *Bonham's* case was not really an assertion of the power of judicial review in its modern sense, but it might have led to the law developing in that way. If the law had so developed, it would have established a position that was intolerable to the parliamentarians, for it would have meant that Parliament could not have passed legislation that would interfere with parts of the royal prerogative. The legislative supremacy of Parliament was necessary to resolve these

conflicts. The conception of the sovereignty of Parliament was thereafter developed for a particular purpose, that is to make possible and support a system of government resting on limited monarchy, elected representatives and freedom of person and property under the law. From that it was eminently reasonable to suppose that when Parliament passed Acts, Parliament intended that the legislation would fit into the existing constitutional and legal structure. This gave us the canons of interpretation followed by the judges: "A statute which is contrary to the reason of the common law or purports to take away a prerogative of the Crown is nonetheless valid, but it will, so far as is possible, be applied in such a way as to leave the prerogative or the common law rights of the subject intact." [2]

This principle in the interpretation of statutes cannot be said to work at all well. There is an air of unreality in a court supposing that Parliament meant to observe a number of principles (contained in that mysterious thing the reason of the common law) when Parliament does not appear to have done anything of the kind. This is pure humbug when we happen to know that the legislation was drafted, debated and passed without anyone supposing that it would be construed as containing some legal rules that would have been excluded if it had occurred to anyone that they might be held to be applicable. On the other hand, when the courts have failed to do this, they have been attacked by many lawyers for running away from their historical function. Legislation gives a Minister the power and the duty to select the sites for new towns,[3] or the Commissioner of Police the job of licensing cab-drivers,[4] or a Controller the job of revoking licences,[5] and the courts take the legislation at its face value: the judgments are assailed on the grounds that the principles of natural justice ought to have been read into the Acts of Parliament because Parliament must be taken to have intended that that would be so.

Then is the Canadian legislation the right solution? It certainly cuts out all the ridiculous pretence that bolsters up much of our canons of interpretation. It makes the legislature say either that an Act is to incorporate certain principles, or that it is not to do so. To make sure that naughty things are detected early enough, by section 3 the Minister of Justice must examine legislative proposals and inform the House of any inconsistency that he may find. A system under which you really should be able to know where you are is definitely attractive. But from the English point of view how would it deal with some of our headaches?

[2] Keir and Lawson, *Cases in Constitutional Law*, p. 8.
[3] *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87.
[4] *R.* v. *Metropolitan Police Commissioner, ex p. Parker* [1953] 1 W.L.R. 1150.
[5] *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 55.

Let us consider the cab-driver. Suppose that the legislation says that a chief officer of police may refuse or revoke a licence at his discretion; he does so, without holding any inquiry or disclosing any evidence or giving any reasons. Under the Bill of Rights, that legislation would have to be construed and applied as if section 2 (*e*) were incorporated. All the difficulties of *Parker's* case [6] are avoided, and cabbies and law dons can feel reassured. But would it work out like that? It is possible that those who draft the legislation know that cab-drivers can become involved with organised vice, and that the police have to use informers who would cease to be of any use if their identity were disclosed in the course of giving a cabbie a "fair trial." If that is an acceptable argument, the draftsman must exclude the Bill of Rights, and then tarts, pimps, ponces and others whose interests some academic lawyers are unwittingly so zealous to protect would still not be able to use cabbies to bring in customers.

Or let us take matters of far more moment, and consider our Town and Country Planning Acts and subordinate legislation. What a lovely time our Minister of Justice would have in ascertaining under section 3 "whether any of the provisions thereof are inconsistent with the purposes and provisions" of the Bill of Rights. Nearly anything in the realm of planning could be attacked in the courts as being an interference with the enjoyment of property without due process of law because of the circumstances in which planning decisions must be made, and so on.[7] I suspect that the poor draftsman would find that the only way of ensuring workable legislation would be to exclude the Bill of Rights. And after all that pother we should be left with the major problems still unsolved: the extent to which it is right to restrict the use of property without paying compensation, what compensation should be paid, and all our other headaches would remain.

Similar difficulties can arise over section 1. We do not want to interfere with civil liberties, but please what are we to do if fascists and communists want to march and counter-march in London on a Sunday to the annoyance of everyone else, obstructing traffic, making an opportunity for hooliganism, and straining an undermanned police force? Dicey wrote as if the only threats to liberty were from the government, and traditional legalism has not been much help in dealing with disruptive minorities. Wherever we turn, our problems are new ones. We are not really threatened by the arbitrary actions of a monarch, or of a parliament, or of devils in Whitehall; the conflict is within ourselves, whether we can find and accept a balance of personal rights and communal claims.

[6] *R.* v. *Metropolitan Police Commissioner, ex p. Parker* [1953] 1 W.L.R. 1150.
[7] *Belfast Corporation* v. *O. D. Cars* [1960] 2 W.L.R. 148 shows the kind of case that would arise.

If we were to have a Bill of Rights on the Canadian model, would the situation be suggestive of a gaggle of generals preparing to fight the battles of an age that has passed? I fear that it would be so. But I do admire the spirit, and the courage, of this Bill of Rights. We have a vast burial mound of law reports, supposed to ensure the immortality of tribal images, though what it really contains is not known for certain. R. M. JACKSON

BY-LAWS IN ISRAEL

Mr. Z. R. Silbiger writes: The note in *Public Law* [8] on the Australian case of *Croft* v. *Rose* [9] was of much interest. Through the courtesy of the Israel Legation in Australia I obtained the full report of the case which proved most valuable in a rather difficult and unprecedented case of ours decided recently by the Supreme Court of Israel.

By-law 3 (*a*) of the Tel Aviv Parking By-laws provides, in substance, that the mayor may designate parking places as " regulated parking places " and have them regulated by means of parkometers or otherwise. " Regulated parking places " are subject to certain regulatory measures and may not be used except upon payment of the appropriate parking fee. The by-law had been held invalid by the District Court of Tel Aviv-Yafo as being in violation of the *delegatus non potest delegare* principle, inasmuch as the municipal council could not validly delegate its powers to the mayor, in the absence of an express provision to that effect in the enabling statute.

On appeal to the Supreme Court of Israel, where I represented the Attorney-General, I strenuously argued against that ruling, relying, *inter alia,* on *Croft* v. *Rose*. The main issue before the Supreme Court was whether the principle of *delegatus non potest delegare* applies to delegated legislation. It would appear that this question of sub-delegated legislation has not yet been authoritatively settled in England.

The Supreme Court, in its elaborate judgment on *Attorney-General* v. *Hornstein,*[10] held (*per* Agranat Dep.C.J., Silberg and Goitein JJ. concurring), that the above maxim applies prima facie to legislative powers. It is not, however, a rule of rigid application but rather a presumption which may be rebutted or negatived by any contrary indications found in the language, scope or object of the statute. At any rate, the maxim is subject, at least, to this qualification that where plenary powers of (delegated) legislation exist as to particular matters, such delegated legislation may validly authorise an administrative

[8] [1957] P.L. 181.
[9] (1957) A.L.R. 148.
[10] Criminal Appeal 74/58, 14 *Piskei-Din* (Official Law Reports) 365.

agency to determine when and where the provisions of a certain regulation should operate. In support of this proposition Mr. Justice Agranat relied, *inter alia*, on *Croft* v. *Rose*, describing that case as " invaluably important " and quoting the following passage therefrom:

> " The most that could be said in favour of delegation was that the Governor-in-Council had placed in the hands of persons other than himself the power to determine when and where the provisions of the regulation should operate. But this does not amount to a delegation that has, as we understand the matter, ever been considered as objectionable or as going to power."

Among other authorities referred to and quoted from by Mr. Justice Agranat in his exhaustive judgment are the well-known constitutional cases of *The Queen* v. *Burah*, *Hodge* v. *The Queen*, *King-Emperor* v. *Benoari Lal Sarma*, two U.S. Supreme Court cases and several American state cases; as well as leading English textbooks in the field of administrative law.[11]

Applying the principles thus enunciated to the case under consideration, the Israel Supreme Court, overruling the unfavourable District Court decision, pronounced the by-law valid, finding nothing objectionable to the powers in question being entrusted to the mayor.

On the other hand, by a majority decision of Agranat Dep.C.J. and Silberg J., Goitein J. dissenting, the Supreme Court upheld the District Court ruling as to the invalidity of by-law 11 (*c*) of the Tel Aviv Parking By-Laws which purported to empower the mayor to fix parking fees. The court held that this function should be exercised by the municipal council itself and could not be delegated to the mayor.

[11] Griffith and Street, *Principles of Administrative Law*, 2nd ed., Allen, *Law and Orders*, 2nd ed., and de Smith, *Judicial Review of Administrative Action*.

PARLIAMENT AND THE PREROGATIVE OF MERCY

G. MARSHALL

THE EXERCISE OF THE PREROGATIVE

A GOOD deal is known on the surface about the manner in which the prerogative of mercy in capital cases is exercised. The evidence of the Home Office given before the Royal Commission on Capital Punishment in 1949 contains much information. In addition, many politicians who have written memoirs have also held the Office of Secretary of State for Home Affairs and their lucubrations are on record. In reviewing sentences the Home Secretary is advised by senior officials in the Home Office. He may see a transcript of all trial proceedings, the judge's notes, and a report on a prisoner's mental and physical condition prepared by the prison medical officer both before and after conviction. He is given police information about the prisoner's character and antecedents, and he will usually receive representations from friends, relations and other persons including, in some cases, Members of Parliament. The consideration given to the question of reprieve in these circumstances is undoubtedly thorough. Henry Matthews in one instance is said to have closeted himself with the papers for three days. At the other extreme there have been cases which, for possibly unavoidable reasons, have received less than their share of ministerial attention. Sir Samuel Hoare has recorded the misgivings which he felt in performing the Secretary of State's functions as the deputy of the Home Secretary. He had on those occasions to accept the Home Office recommendations without serious inquiry. "It was clear that what was required of me was a signature without which an execution could not take place, and I was in no position to refuse it." [1] More than once, he adds, there were two capital cases to decide simultaneously and they were brought to him in the midst of cabinet and departmental work, when other urgent matters were claiming his attention. Hoare's experience could not be called typical. In 1935 or thereabouts Sir John Simon

* The author is a Fellow of The Queen's College, Oxford, and Assistant Editor of *Public Law*.

[1] *Nine Troubled Years* (1954), pp. 248–249.

had placed upon the Home Secretary's calendar of pending executions the inscription *Nulla unquam de morte hominis cunctatio longa est*, which enjoins his successors to act with deliberation, and there is no reason to think that the warning goes unheeded. Indeed when Hoare returned to the Home Office in 1939 he found Simon's calendar an over-morbid reminder of his responsibilities,[2] about which in any event he felt some doubts. Both the procedure and the effect upon reprieves of differences of outlook in penal questions held by holders of the Home Secretary's office were suggested as matters of concern. Of relatively recent incumbents however, none has made, after leaving office, any fundamental criticism of the procedure for granting reprieves. All are agreed that nothing in the nature of a formal advisory committee would be desirable or necessary, and that responsibility must lie upon the minister. This was argued before the Royal Commission in 1949 by a number of witnesses. The official witnesses and at least one judge (Mr. Justice Byrne) were also in agreement that the public were not disturbed by the secrecy of the procedure or by the fact that clemency was exercised in some cases and not exercised in others.[3] Unofficial witnesses on the other hand thought differently. The Howard League for Penal Reform, for example, suggested that numbers of questionable decisions had been taken by Home Secretaries and listed eight executions in the preceding fourteen months which they alleged to have caused bitter local feeling.[4] Similar dissents have been expressed in Parliament and elsewhere about the decisions of Home Secretaries since 1950. Inside Parliament, however, backbench dissatisfaction with the attitude of ministers towards capital punishment in general has been complicated by uncertainty about the nature of ministerial responsibility for the exercise of the prerogative of mercy. The principal difficulty relates to parliamentary questions. In general, as members are informed by Erskine May, questions may be asked of ministers who are the confidential advisers of the Crown about matters which relate to those public duties for which the sovereign is responsible.[5] Yet it is a view which has come to be firmly held by Secretaries of State, and incorporated in the rules of the House, that they are not open to question in the Commons about the advice which they give as to the use of the prerogative in capital cases. Nor, until such time as sentence

2 But then, Hoare was unduly sensitive to his milieu. "The Secretary of State's room," he wrote, "filled me with gloom. . . . Like Buffon who could only write his books in a classical summer house amidst flowers and avenues, and Glück, who could only compose music in the open air with a bottle of champagne at his side, I needed congenial surroundings for any good work." The Home Office (quite apart from Simon's Latin) failed to meet these requirements.

3 *Minutes of Evidence*, p. 273 (Byrne); *cf.* p. 370 (Sir John Anderson).

4 *Op. cit.*, p. 280.

5 Erskine May, 16th ed., p. 358.

has been carried out, can that advice be the subject of any form of debate. This is a paradoxical position, since the exercise of the prerogative power is plainly an executive act based upon a decision of public policy in which the Crown plays no actual part and which may be a matter for cabinet discussion.[6] The present parliamentary rules, it could be argued, have not developed by anything which could be called a process of rational argument. Nonetheless it is at least conceivable that a mixture of legal fiction and confused precedent have combined to produce a situation which so squares with current moral intuitions that it should not be disturbed. On the other hand it may be that ministerial reticence and restrictive rulings have between them entangled the House in a strait-jacket which improperly constricts the right to debate executive action.

The Rule Against Question and Debate

Like the restriction on parliamentary questioning of the award of honours, the impropriety of inquisition into ministerial action or intention as to the prerogative of mercy has its historical foundation in the assertion that the matter is one between the Minister and the sovereign. Even in 1947 Mr. Speaker Clifton-Brown was able to say that "A Minister is responsible to the King and not to the House for the advice he proposes to tender to His Majesty."[7] He added that the minister was responsible to the House for the advice once it had been tendered. These statements are of course really incompatible. How can one fairly be held responsible for having given advice which was free from responsibility in the giving? In what sense could advice be tendered freely at any moment in time if at some later moment the giver is to be described as accountable for it? Equally the sovereign's involvement in the decision, if real, could hardly be affected by the temporal distinction drawn by Speaker Clifton-Brown's ruling. It could not be conjured away and imputed to the Minister merely by the invocation of the past tense. Ministers, moreover, do not when reaching their decisions allot to the sovereign any responsibility or title to consultation which differs from that enjoyed in relation to other executive and legislative acts. Mr. Herbert Morrison certainly discussed death sentences with George VI, apparently on the King's initiative. The King, he says, "Would listen to my views and as

[6] The case of Sir Roger Casement provides an example. The cabinet "considered the question whether Sir Roger Casement should be executed on at least three occasions" (Spender and Asquith, *Life of Lord Oxford and Asquith*, Vol. II, p. 214).

[7] 434 H.C.Deb., c. 959.

eagerly give his own." [8] The experience of Sir Samuel Hoare however appears to have been different. "It might be thought," he wrote, "that the Home Secretary's recommendation for the exercise of the Royal Prerogative of mercy would bring him into frequent contact with the sovereign. This is not the case. So far as I know no Home Secretary in modern times has ever raised in an Audience the question of a death sentence." [9] The formal involvement of the sovereign seems however to have played a considerable part in providing Ministers in the nineteenth century with a form of argument for turning aside questions on prerogative matters, of which honours and military appointments are examples. Lord Liverpool in 1809 regarded a question about the appointment of Sir Arthur Wellesley as an attack upon the King's prerogative,[10] and Peel in 1842 declined to say whether the Lord Mayor of Dublin would be given an honour similar to that conferred on the Lord Mayor of London upon the birth of a royal heir. His words were "I must positively decline answering any such questions as to the advice which I deem it right to give to the Crown on the disposal of civil honours." [11] At this period, however, it was becoming clear that ministers could not shelter themselves from questions about civil and military matters governed by the prerogative simply by using this form of answer. The political responsibility of the Crown's servants was clear. In the matter of the prerogative of mercy Peel had remonstrated successfully against royal intercession in 1830 (when a letter had been sent without ministerial advice to the Lord Lieutenant of Ireland).[12] Nonetheless in refusing to answer members' questions about the remission of sentences, Ministers continued to invoke the sovereign's name (as they still do) but also to advance grounds of inconvenience or impropriety of an independent kind about the administration of justice which had, and have, nothing to do with the prerogative status of the decisions in question. Ministerial protest thereafter hardened into parliamentary doctrine. Examples from the mid-century onwards illustrate this process.

The case of Mary Furley

The accused woman had thrown herself and her child into a pond, but had herself been rescued whilst the child died. She was in a state described as one of appalling destitution. The trial judge warned her that she could not expect her sentence to be commuted. Questioned in the House in April 1844 by John Bright, the Home

8 *Herbert Morrison, An Autobiography* (1960), pp. 226–228; *cf. Government and Parliament*, p. 81.
9 *Nine Troubled Years* (1954) p. 250.
10 Parl.Deb. 1s., Vol. 14, c. 31.
11 Parl.Deb. 3s., Vol. 62, c. 376.
12 The correspondence is printed in C. S. Parker, *Sir Robert Peel*, Vol. 2, pp. 147–150.

Secretary, Sir James Graham, said that it was " not consistent with his duty to enter into a discussion upon this subject." [13]

The case of William Mays

Mr. Tufnel in the following year asked Sir James Graham whether William Mays, who had been convicted of assault on a gamekeeper with intent to do grievous bodily harm, was to be pardoned. The Home Secretary (in words similar to those used by his predecessor Peel in refusing to discuss honours) replied that it was " not by any means convenient that he, as Secretary of State, should be called upon to state the advice which he was prepared to offer to the sovereign with respect to the exercise of the Royal Prerogative." Convenient or not, however, he proceeded to explain in some detail that at the trial of others, inculpated in the same transaction, circumstances had emerged which confirmed the impression of Mays' innocence and that a free pardon would be recommended on that ground.[14]

It may be noted that the inconvenience of which Graham complained was compounded of an element which has since disappeared. Until the Criminal Appeal Act of 1907 was passed the Home Secretary's powers could be described as being partly executive and partly judicial in that he had to act in effect as an appellate authority for criminal appeals. A large number of cases [15] would come before the Home Secretary for review in which he could be said to be acting as part of the machinery for the administration of justice and thus the more readily represent public debate as an intervention in the ordinary course of justice. Henry Matthews, Home Secretary in Lord Salisbury's 1886 administration, based refusal to answer questions in the House on this ground in two well-known cases, those of Lipski and Mrs. Maybrick.

The case of Israel Lipski

Lipski was sentenced to death in 1887. Agitation by Lipski's solicitor and the *Pall Mall Gazette* led to the organising of a petition by members of Parliament. Mr. Cunninghame Graham put down a question to the Home Secretary inquiring whether he was aware that the petition signed by 100 members was to be presented to him and whether he would reconsider his decision. Matthews replied " I must formally protest against interference with the ordinary course of the administration of justice by Questions in the House." In reply to an earlier question he had said that it was " highly inexpedient and

13 Parl.Deb. 3s., Vol. 74, cc. 106–107.
14 Parl.Deb. 3s., Vol. 82, c. 1369.
15 Graham's biographer says that four thousand cases a year came to the Home Office. (A. B. Erickson, *The Public Career of Sir James Graham*, p. 238.)

injurious" that the circumstances of a criminal case should be made the subject of discussion or Question.[16]

The case of Mrs. Maybrick

Two years later Matthews again found himself questioned about the exercise of the prerogative. Mrs. Florence Maybrick, charged with the murder by poisoning of her husband, was sentenced to death by Mr. Justice Stephen whose summing-up to the jury and conduct of the trial caused some public disquiet (affected as he appears to have been by the illness, which in the following year, caused his retirement and early death). Under pressure in the Commons Matthews repeated his view that "The advice which I conceive it my duty to tender to Her Majesty is not a matter for question in this House."[17] In fact Matthews decided to reprieve Mrs. Maybrick and announced his reason for so doing. The ground given, namely, that the accused had administered poison in an attempt to murder, but that there was doubt whether her action was the actual cause of death, was thought by Charles Russell, her counsel, to amount to a statement that she had committed a crime (attempted murder) for which she had not been placed on trial.[18] Russell made persistent attempts to secure her release on this ground, a task in which, even as Lord Chief Justice, he was unsuccessful, and Mrs. Maybrick remained in prison until 1904.

The year 1904 was also the one in which the second conviction of Adolf Beck on the basis of mistaken identity provoked a Committee of Inquiry whose report did not reflect favourably on the Home Office. Three years later the new Liberal government introduced the Criminal Appeal Act, which removed from the Home Secretary the burden of using the prerogative as an instrument for remedying deficiency in the regular course of criminal justice, and left him with the duty in homicide cases of advising upon the course to be taken once the machinery of justice had run its course. Since 1908, when the Act came into operation, debate or questioning of the Secretary of State's decision, whatever its merits, can hardly be called an interference with the administration of justice in the sense which that phrase might have borne before the Criminal Appeal Act. Herbert Gladstone, Campbell-Bannerman's Home Secretary, speaking on the second reading of the Bill on May 31, 1907, showed himself well enough aware of this point. Contrasting the judicial function to be exercised by the proposed court of appeal with the "administration of the prerogative of mercy by an executive department of Government," he remarked that: "There is no legal finality in the position

16 Parl.Deb. 3s., Vol. 319, cc. 253 and 1103.
17 Parl.Deb. 3s., Vol. 340, c. 128.
18 R. B. O'Brien, *Life of Lord Russell of Killowen* (1901), p. 260.

of the Home Secretary. The consequence of that is that although he might come to a clear and definite decision he is always exposed to pressure to reconsider that decision. *Questions may be asked in the House of Commons* and letters written to the press." [19] In the previous month in reply to a parliamentary question he had said " the exercise of the prerogative of mercy does not depend on principles of strict law and justice. . . . It is a question of policy and judgment." [20] Even before the fundamental change of 1907 it could not be claimed that the Home Secretary's function was seen primarily as a judicial one. Gladstone in making the latter remark said that he was quoting Sir William Harcourt and many similar statements could no doubt be found.[21] After 1907 it is even clearer that the function can only be misleadingly described as part of the administration of justice.[22] It is a duty in which the Home Secretary may properly take into account popular feeling in the matter and the " shock it would give to the great mass of the public." If public feeling is relevant, then the expression of public feeling can hardly be irrelevant or improper and there is something odd about the view that public feeling can be manifested by the people themselves but not by their representatives in Parliament.

It does not seem clear however (despite more recent remarks about well-established precedent) that this view is in its modern form as long standing as recent Speakers' rulings suggest.[23] In the eleventh edition of *Erskine May* which appeared in 1906 there is no mention of a prohibition of questions about the exercise of the prerogative in this sphere. In 1913 the Home Secretary's use of the prerogative was also discussed in relation to another matter, namely, the " cat and mouse " release of suffragette prisoners and Mr. McKenna was categorical about his accountability. His words were that " the power of advising the exercise of this prerogative is unlimited but the control of that power lies in the House of Commons." [24] Several years earlier Herbert Gladstone was able, as we have seen, to say without contradiction in the Commons, that questions might be put to him about reprieves. All that seems to have happened at this period is that Ministers have in some capital cases protested and refused to answer

19 Parl.Deb. 4s., Vol. 175, c. 187 (italics added).
20 Parl.Deb. 4s., Vol. 172, c. 366.
21 Sir Edward Troup in *The Home Office* (1925), p. 68, quotes Palmerston as saying that " the intercession of the Magistrates and other persons " had led to his exercising the prerogative even where his own opinion had been that the law should take its course—hardly a description of a judicial attitude.
22 A point consistently ignored by recent Speakers.
23 Mr. Speaker Morrison in 1953, for example, affirming the ruling that capital sentences cannot be raised by question or debate whilst the sentence is pending, spoke of the position as being " a thing of great antiquity in the House " (510 H.C.Deb. 5s., cc. 849–850).
24 51 H.C.Deb. 5s., c. 1095.

—a phenomenon which occurs in relation to other fields of executive policy without its being thought that the putting of questions is constitutionally improper or out of order. Later editions of *Erskine May*, which lay down that such questions may not be put until the execution of sentence has taken place, refer the reader in the first place to the 1889 volume of the Parliamentary Debates. This however merely reveals a ministerial refusal to answer (that of Matthews in the *Maybrick* case). No reference is given to any precedent between this instance and 1921 when Mr. Speaker Lowther is to be found giving a ruling strongly adverse to parliamentary questioning and imputing to the House as a whole views which it is doubtful if it had ever held. The ruling related to two Irish prisoners, Wheelan and Moran.

The case of Thomas Wheelan and Patrick Moran

" No question," Lowther ruled in 1921, " ought to be answered by the Home Secretary as to the advice which he will tender to the Crown, or by the Chief Secretary as to the advice which he will tender to the Lord Lieutenant. . . . *The House has always felt* that it is very undesirable that these cases should be discussed here or even raised by way of question and answer." He saw " great objection to putting into interrogative form reasons for, or it may be objections against, the prerogative of mercy." [25] The letter which Lowther had written to the member whom he had refused to allow to put the question, stated, perhaps even more categorically, that the issue was " not a matter which ought to be discussed in the House." [26] It is possibly from this ruling of Speaker Lowther in 1921 that the present extremely restricted situation should be dated, and three things may be noted about his statement.

First, there is no reference to the change in the Home Secretary's functions which took place in 1907, and nothing suggested beyond precedent and the old " prerogative advice " point to justify the undesirability of parliamentary discussion of the Home Secretary's executive decision. Secondly, the phrase " the House has always felt " is sufficient in itself to raise suspicion. It very often implies that the House has felt the exact opposite but could find no way of giving expression to its view in the face of ministerial resistance. And so it seems here. " The House's view " is primarily a ministerial view. Thirdly, it may not be entirely irrelevant that between the dates of the two footnote references in *Erskine May* the administration of justice had been faced with certain problems in Ireland which may

[25] 139 H.C.Deb. 5s., c. 846 (italics added).
[26] 139 H.C.Deb. 5s., c. 845.

have hardened ministerial resistance to provision of a parliamentary forum for debating individual executions.[27]

However this may be, Speaker Whitley followed the ruling of Speaker Lowther, saying that it was "a matter upon which my predecessor frequently disallowed questions,"[28] and subsequent Speakers have followed the same course. At the same times the distinction, clear in its operation but unclear as to its rationale, came to be made between responsibility to the Commons before and after the execution of a capital sentence. This distinction was elaborated by Mr. Speaker Clifton-Brown in 1947 in a ruling which contrived to be simultaneously sweeping, emphatic and confused.

The Gold Coast Executions

Eight Africans had been charged with murder and sentenced to death in 1944. Three years later they were still unhanged after, it was alleged, having been taken to and from the place of execution a number of times. Efforts to question the Colonial Secretary were held by the Speaker to involve discussing the use of the royal prerogative.

Replying to a subsequent question by Mr. Silverman, the Speaker conceded that the Home Secretary was responsible for his advice to the Crown once it had been given and sentence carried out. He might then be challenged as to why he had not given certain advice and he might be criticised on the relevant vote in Supply or on Adjournment. But here again the anachronistic nineteenth-century arguments were cited to the effect that (quoting Matthews) the House would be claiming to act as a court of appeal from sentences pronounced by the courts if it were to discuss or question the Secretary of State's action in the exercise of his prerogative. Debate, it was added, would be "tending towards an interference with the administration of law."[29] Whatever other grounds there may or may not be, these are simply not tenable bases for the restrictions which they allegedly support. If they were, and if the Home Secretary's decisions were to be considered in a judicial light as a part of the administration of law, the prohibition on questions would be as forceful after the decision had been made as before. Judges are not called to account for their decisions. Speaker Clifton-Brown's earlier ruling also contained the royal prerogative argument, stated this time in an extremely categorical form. It was not, he said, in order to discuss the royal

[27] A suspicion voiced by Mr. Leslie Hale in 1947 (510 H.C.Deb. 5s., c. 852). It had at an earlier period, he thought, been commonplace to raise questions about the prerogative of mercy, but the right had been lost "because we were executing so many decent Irishmen . . . that it became a burden for Ministers to defend themselves at that time."

[28] 142 H.C.Deb. 5s., c. 1523.

[29] 434 H.C.Deb. 5s., c. 959; *cf.* Mr. Speaker Hylton-Foster, February 7, 1961.

prerogative at all. That was a matter entirely for the Crown itself. Being a matter for the Crown, the Minister was not responsible and the issue was not arguable in the House.[30]

It may be that the high constitutional principle enunciated on this occasion was what moved Sir John Anderson to state a similar view to the Royal Commission on Capital Punishment three years later. That the Commissioners were mildly surprised may be gathered from the following exchange:

> *Sir John Anderson*: " The Home Secretary is responsible to the Crown and not to the House of Commons in a prerogative matter not merely in this case of capital punishment *but in any prerogative matter*. . . ."
>
> *Q.*: " That rests upon the constitutional theory that the King can do no wrong and therefore it is incompetent to question any act which is performed by the King. . . ."
>
> *Sir John Anderson*: " It rests, I think, on general considerations of constitutional propriety. The direct relations of the Sovereign and his Ministers are not matters that can be canvassed in the House of Commons." [31]

If, of course, this view of prerogative matters were universal, the lengthy list in Bagehot's *English Constitution* of actions which can legally be performed in the Queen's name without parliamentary assent could hardly be recited in the accepted *allegro* manner. However, the Royal Commission had already been given on the previous day a rather different view by Sir John Simon, who saw no merit in the opinion that the Home Secretary should not be questioned about public duties for which he was in fact responsible and for which he drew his salary. " Every Secretary of State," he suggested, " gives confidential advice to the Sovereign about all sorts of things. . . . I never heard anybody say that because it was confidential advice a member of the House of Commons could not question him about it." [32]

In fact of course this very thing had been said, with apparent conviction, in the House of Commons on a number of occasions and, however lacking in compulsiveness, is still cited by Ministers as a ground of their immunity from questioning.

The case of Derek Bentley

In 1953 Clifton-Brown's ruling was followed by his successor. Bentley was hanged for his part in the murder of a policeman whilst

30 434 H.C.Deb. 5s., c. 41.
31 Royal Commission on Capital Punishment, Minutes of Evidence, p. 363 (Day 16). Italics added.
32 *Ibid.*, p. 348.

his more directly-involved accomplice Craig was reprieved on grounds of age. There was a recommendation of mercy by the jury on Bentley's behalf. Before Bentley's execution fifty members of Parliament placed on the order paper a motion " that this House respectfully dissents from the opinion of the Home Secretary that there were not sufficient reasons for advising the exercise of the Royal Clemency in the case of Derek Bentley and urges him to reconsider the matter so as to give effect to the recommendation of the jury." The Speaker directed that the motion should be removed from the order paper, on a principle which Mr. Leslie Hale was willing to call " the greatest invasion of the rights and privileges of Members of this House made over the last three hundred years." [33] His argument was that whatever the rule might now be about questions, many things might be challenged by a substantive motion which could not be discussed within the rules of order at question time. The Speaker replied however that the rule covered both question and debate and that a motion could be put down once the execution had taken place. Moreover an attempt to adjourn the House by an urgency motion under Standing Order No. 9 was equally impermissible (so Speaker Lowther had ruled in 1920) [34] as being an interference with the " ordinary administration of the course of justice."

This then appears to represent the present parliamentary position. The Secretary of State is responsible for his conduct in that he can according to Speakers' rulings be " challenged " about his action in the House once it has taken place. This means that a motion or question will not at that stage be out of order. Ministers have nevertheless taken it upon themselves to assert that no reasons need or should be given for the decision to grant or withhold advice about the exercise of the prerogative of mercy either before or after its exercise. Mr. R. A. Butler (whose decisions to grant or refuse reprieves have followed no discernible outward pattern), stated on December 10, 1960, in reply to a question by Mr. Silverman that he did not intend to take the opportunity of explaining to the House his reasons for refusing a reprieve in the case of Francis Forsyth and Norman Harris, aged eighteen and twenty-three, who had killed in the course of robbery. " My answer to the honourable member," the Home Secretary said, " must be in the negative in accordance with tradition, as carried out by my predecessors." [35] After the tabling of a censure motion in the names of about eighty members the Home Secretary repeated that he could give no assurance that in any debate he would depart from precedent or be able to satisfy the House by giving reasons.

[33] 510 H.C.Deb. 5s., c. 854.
[34] At 135 H.C.Deb., c. 931; *cf.* 573 H.C.Deb., c. 1142 (case of John Vickers).
[35] 629 H.C.Deb. 5s., c. 1223 and 632 H.C.Deb., cc. 1094–1115 (unrevised).

He might, however, have some discussion of the issues involved in answerability with his predecessors in office.

The Merits of Questioning, Reasons and Debate

The rule against question or debate whilst executions are pending, though a matter of public interest, is primarily an issue for the House itself. But it may be legitimate to inquire what might be the consequences of its modification. Many might be willing to support the rule on the ground that the House of Commons is an inappropriate forum for debating individual cases involving life and death. In addition it may be felt that the Home Secretary could not be expected to bear the burden of decision in these cases if there were the possibility of a concurrent challenge and even the risk of a successful motion carried against him in favour of a reprieve (or an execution). There is some force in these arguments and might be more if it were really the case that the Secretary of State in advising reprieves were applying his mind, as is a judge or a tribunal, to a set of rules or criteria previously determined by Parliament. But he is not so doing. It cannot be argued that he is simply acting judicially, or acting for himself or acting for the government. He is making policy decisions, sometimes of a controversial kind, as an executive officer. The case is one in which a high degree of trust may be demanded from the House, but there are other executive decisions involving both matters of life and death and finely balanced exercises of judgment which are not thought to involve any such complete procedural immunity from parliamentary pressure. In matters of reprieve no objection is raised to publicity and agitation by press or public and no question of contempt is thought to arise as it would if a judicial analogy were pressed. The pressure of public opinion is accepted as legitimate and the Home Secretary considered capable of resisting it or yielding to it in appropriate cases. All 630 members might without offence address a petition in their private capacities to the Minister. Doubts about allowing the pressure which exists to take a parliamentary form may in part rest upon uncertainty as to the constitutional or moral difficulties which might arise from the possibility of votes and divisions in the House. But snap votes on a motion debated in private members' time would not be recognised as involving confidence or engendering either kind of embarrassment even if carried. The present Home Secretary's views about House of Commons opinion registered in that way have on several occasions been made plain. On the other hand no other kind of defeat is likely, or at least is as little or as much likely as at the end of any debate on government policy. It is not to be conceived that in a vote of censure involving confidence, government backbenchers, however hostile to a decision, would assist in

defeating the Minister. In that catastrophic and unlikely situation there would clearly be a change of Home Secretaries if not of governments and reprieves in the cases in question would morally have to be granted without reference to the particular merits as they were in 1948 and 1956 after abolition motions had been carried on free votes in the Commons. Debates which do not succeed in overturning ministerial judgment (as debates in general do not) are not thereby pointless. They are normally thought to have their effect in modifying future government policy and they ought, as Bagehot said, to " teach the nation what it does not know."

The permissibility of questions is perhaps a matter in which the House should know its own business best. But the desirability of questions cannot be separated from the general issue of the nature of the decision taken by the Secretary of State and its fitness for debate and the giving of reasons. Arguments for debate and accountability are arguments for reasons. What then are the merits of ministerial practice in declining explanations when the stage of " accountability " is reached after the carrying out of an execution? One thing seems clear. The view implied by Mr. R. A. Butler's statement of December 10, 1960, rests not so much upon constitutional convention as upon past ministerial assertions about the balance of convenience as seen from the Home Office. In so far as there is any convention in the matter it might seem to indicate that reasons should be given. The House's procedure, as outlined by Speaker Clifton-Brown in 1947, envisages that the Home Secretary may be open to challenge and can be described as " responsible " to the House once his advice has been tendered. No Minister is of course compelled by the rules of the House to answer questions of any description but the acceptance of an obligation to do so (outside of the category of security matters) is simply the condition upon which ministerial responsibility can be said to exist. To deny that any account need be given of ministerial decisions in a particular sphere is in effect to deny ministerial responsibility for action taken in that sphere. It is difficult to see therefore how Ministers can assert the impropriety of giving an account to the House and also agree that they are, as successive Speakers have ruled, responsible to the House for the decisions which they have made, once they have made them. There may be a danger that parliamentary statements relating to the impropriety of debate in the pre-execution period will be conflated with the admittedly strong parliamentary *obiter dicta* by recent Home Secretaries, to produce an alleged new constitutional convention which can be used to justify the withholding of reasons both before and after the exercise of the prerogative. But as far as past practice goes it is not true that

reasons have been invariably withheld.[36] And in the matter of extra-parliamentary opinion as to the propriety of stating reasons, two things may be said. First, Ministers are not always displayed in their most objective light when discussing the practicability or desirability of reasoned decisions. Secondly, reasoned views of an opposite kind have also been put forward. In his evidence given to the Royal Commission on Capital Punishment, for example, Mr. Justice Humphreys said:

> " Where it is the King's Prerogative of Mercy one can understand that nobody must ask the King why he did it; but now that everybody knows that it is not really the King's Mercy I am in some difficulty myself in seeing why the Home Secretary should not say ' It has been found in this case that the man has since gone mad and therefore I recommend a reprieve,' or ' It has been found in this case that there were three relatives who died of insanity which was quite unknown to the jury or the judge and had not been found out at the time of the trial.' Why should he not so say? There would be no quarrel about it at all. It would be a very good reason. If his real reason is something totally different which he does not want them to know, then I dislike secrecy." [37]

At least one of the medical witnesses also thought that the general nature of the reasons in each case could be given. " There must," he said, " be some basis on which reprieve is decided and it should be made known in each case." [38] The Home Office evidence moreover set out in some detail for the Commission the classes of cases " in which it is and has for long been the established practice to recommend the commutation of the sentence of death." [39] Apart from mental abnormality the following categories were stated: 1. Killing of offspring by women. No woman had, it was stated, been executed since 1889 for the murder of her own child, and no woman since 1849 for the murder of her child under the age of one year. 2. Suicide pacts (where genuine). 3. Where special motives excite sympathy—for example where incurable disease or an imbecile child is involved.

[36] The case of John Williams (47 H.C.Deb. 5s., c. 1139) provides an example of very convincing reasons being given for the refusal of a reprieve. Various considerations were placed before the Home Secretary, Mr. McKenna, in an adjournment debate, including the alleged facts in a letter written to the prisoner by one Freddy Mike. The Home Secretary said, " I have given full and careful investigation to the story. . . . I have traced the family history of the man who calls himself Freddy Mike. . . . It is said he said that he had a twin brother. He has no twin brother. He said that the twin brother or a friend of the twin brother was in Eastbourne that night. There were no such people and the whole story is a pure invention as he himself now admits " (c. 1143).

[37] *Royal Commission on Capital Punishment. Minutes of Evidence*, p. 260.

[38] *Ibid.*, p. 551.

[39] *Home Office Memorandum. Minutes of Evidence*, pp. 3–4.

4. Where there is a scintilla of doubt despite the jury's verdict. 5. Where the physical condition of the prisoner may cause difficulty in carrying out the sentence expeditiously or humanely. 6. Where two or more persons were involved and it may be thought right that a secondary partner should be reprieved and the principal executed, or a secondary partner reprieved because the principal has escaped trial, conviction or execution. 7. Where the Home Secretary commutes the sentence " in deference to a widely spread or strong local expression of public opinion." This was not, the Home Office memorandum said, an exhaustive catalogue nor was any single ground conclusive. Nevertheless " experience shows that in the majority of cases there are clear grounds for deciding that the sentence of death should be carried out or should be respited; and . . . it is only a comparatively small number of cases which call for especially close consideration in the light of the particular circumstances." [40] In evidence before the Commission Sir Alexander Maxwell went so far as to say that in only " a minute fraction " of cases was there any real doubt felt in the Home Office as to whether there should be a reprieve or not.[41] In other words the great majority of cases were decided upon some previously established general principle and the decision could be formulated in terms of some one or some combination of the grounds listed.

On the basis of this evidence the Royal Commission might well have thought that there was something to be said for recommending that decisions should be accompanied by reasons at least of a general nature. They were clearly deflected from this conclusion however by the opinions expressed by two ex-Home Secretaries, Sir John Simon and Sir John Anderson. This evidence was found " wholly convincing," [42] but it is not easy to see why the Commission should have been convinced by it. Sir John Simon thought that there might be a case in which the Home Secretary might have information given to him under a pledge of secrecy, or in which publication of such information might " bring assassination on somebody or other." [43] About this type of objection it might be said first that it can arise (to use the Home Office's phrase) in only a " minute fraction " of cases and secondly that it is at most an argument for sometimes withholding some reasons. The same is true of the possibility that a full disclosure might contain statements defamatory of third parties. The discussion of all administrative decisions in Parliament is subject in some cases to possibilities of this kind. They are not normally thought to be

[40] *Home Office Memorandum. Minutes of Evidence*, p. 2.
[41] *Ibid.*, p. 51.
[42] Report (Cmd. 8932) para. 603.
[43] *Minutes of Evidence*, p. 351.

sufficiently serious to outweigh the general advantage of having a reasoned defence of ministerial activities. It is not necessary to sacrifice the general principle to achieve an end which could be attained in any particular case of difficulty by a statement that public interest necessitated the withholding of the particular detailed consideration which had determined the decision. There are good precedents for statements of that kind in other fields where the general rule of reasons and accountability holds. But if the Home Office picture is right the great majority of cases are not of this kind.

Sir John Anderson was " utterly opposed to the suggestion that the Home Secretary should be required to publish his reasons." But his views derive their emphasis partly from his view already noted that prerogative matters ought not to be canvassed in the House. If that view is taken seriously as a part of the argument about decisions to reprieve it is of course as cogent after the prerogative has been exercised as before. His opinions about the practical difficulties of providing reasoned decisions were similar to those of Sir John Simon. They also contained the somewhat Platonic argument that to allow an irrevocable sentence to be carried out might in some circumstances involve the risk that some other person could in fact later be shown to have committed the crime for which a man had been hanged. The Home Secretary " would not be justified in exposing the whole system of capital punishment to that risk." But, it is added, " such an explanation could never be given in public."[44] One is tempted to add " Not by a British Civil Servant, at least." Ministers are servants of the Crown and they have all read Burke and on those assumptions there tends to come into existence a paradoxical class of actions (being influenced by representations is one) which it is proper to do but difficult publicly to say that one is doing. Thus it may be, according to Home Office canons, entirely proper for public opinion to be brought to bear on the Home Secretary and entirely proper for a decision in some cases to be influenced or even determined by the state of public opinion, but yet embarrassing for it to be said openly that the decision has been influenced by public opinion. In Sir John Anderson's evidence there is mentioned the case of a Canadian soldier sentenced to death. " There were," he said, " very strong representations in his case, and the man was in fact reprieved, but I am not prepared to say whether they contributed materially to the decision to reprieve." [45]

Thus, when it is suggested (and this is advanced by Ministers as the principal argument) that it is *impossible* to give " an adequate impression of the cumulative effect of the considerations . . . which the

[44] *Ibid.*, p. 370.
[45] *Ibid.*, p. 371.

Home Secretary has to take into account," [46] some doubt may be entertained about the precise kind of imponderability which is so often attributed to decisions in this field. It may be hazarded that the difficulty is not one of mere ineffability of the kind which might be associated with conveying the infinitely subtle, transmitting an intuition, or communicating rapture. Ministers are not usually at a loss for words in describing and defending their decisions or thought processes when they come to write their autobiographies.[47] The reluctance is more plausibly associated either with unwillingness to identify one of the factors in the decision or with a retreat to the notion of multiple considerations as a ground for declining to defend the preference given to one known consideration as against another. What the Home Office calls "a careful balance of conflicting considerations" must come to this. On the one hand (it may be) there was no recommendation to mercy by the jury. On the other hand the accused is a woman.[48] On the one hand there was no great provocation sufficient in law to reduce the seriousness of the offence. On the other hand the prisoner's background or physical and mental condition may be such as to raise a doubt about his stability. On the one hand he was a secondary partner in the affair. On the other hand the victim was a policeman. Clearly in a large number of cases—the women for example—the determining factor is a single criterion from the Home Office's list. Where that is not so, the case must be one in which one existing criterion or a new one is given preference to or thought more important than another. Can it really be impossible to give even in "a comparatively short statement . . . an adequate impression" of the considerations involved.[49] The difficulty of formulating an "adequate impression" of the factors involved in the calculation may be emotionally connected with the difficulty of giving an adequately persuasive defence of the result. But the latter is not the kind of imponderability which is in question here. There are two further issues which are equally irrelevant but which have traditionally been introduced when the practicality of reasoned decisions has been under discussion. The first is whether a more formalised set of criteria for reprieve would help the Secretary of State to reach his decision. The second is whether a list of criteria should be made exhaustive. It was to these two questions which Herbert Gladstone was addressing

[46] *Ibid.*, p. 370.

[47] See for example the three cases described by Lord Morrison. *Autobiography* (1960) pp. 227–228. In each case a single overriding reason for the decision is stated. In one instance a man "had endured years of provocation." In another "there was only the man's own evidence." In the third, there was "only one reason for the decision; the girl was only just over eighteen at the time of the crime."

[48] Figures given in the Royal Commission's Report indicate that between 1900 and 1948, 126 women were sentenced to death and 113 reprieved.

[49] *Minutes of Evidence*, p. 370.

himself in a well-known passage which is quoted by the Home Office memorandum and in the books by Sir Edward Troup and Sir Frank Newsome in the Old Whitehall and New Whitehall series. After setting out a number of relevant principles which he and his advisers took into account, Gladstone concluded " An attempt to reduce these principles to formulae and to exclude all considerations which are incapable of being formulated in precise terms, would not I believe aid any Home Secretary in the difficult questions which he has to decide." [50] Neither of these points bears conclusively upon the question whether the considerations which were in fact thought relevant in a given case can be stated. The phrase " considerations which are incapable of being formulated in precise terms " is misleading. What cannot perhaps be formulated in precise terms is the weight to be given to a particular consideration. Nobody demands that it should. But any considerations which can be clearly entertained can be clearly formulated. That is one way in which decisions differ from hunches, impulses and guesswork. If there were in fact criteria whose existence was unannounced (such, conceivably, as the undesirability of reprieve, other things being equal, of those involved in the killing of policemen) that would seem to be a matter of legitimate concern to the Commons.

Unfortunately the relatively unargued conclusions of the Royal Commission on this point have provided a ready-made brief for subsequent Secretaries of State. But equally strong and strikingly similar arguments involving " difficulties," " inconveniences " and " repercussions " have recently been re-examined in other fields of executive action. There seems no convincing reason to believe that the ministerial evidence of 1949 and the constitutional theories of Sir John Anderson should remain the last word on this subject.

[50] Parl.Deb., Vol. 172, 4s., c. 366.

FEDERALISM IN WEST GERMANY

G. Sawer

The West German constitutional system has received little detailed attention from English-speaking scholars, and that little mainly from Americans writing in American and German journals.[1] Perhaps this is due partly to the provisional official character of the régime, shown by the choice of the expression "Basic Law" (*Grundgesetz*, here cited GG.) rather than "Constitution" (*Verfassung*), to describe its fundamental instrument. The West German Parliamentary Council which adopted the GG. in 1949 expected and hoped that the Russian-occupied East Zone would eventually be reunited with the British, American and French-occupied Zones whose emancipation made West Germany possible, and wished to avoid any suggestion that the GG. itself was a bar to reunification; accordingly Article 146 of the GG. reads: "This Basic Law shall cease to be in force on the day on which a Constitution adopted by a free decision of the German people comes into force."[2] However, the GG. has now operated for more than ten years, and the condition for its ceasing to operate seems farther off than ever. Furthermore, if reunification were to take place on the only terms now acceptable to most West Germans, it is probable that Germany would continue to be a federal nation, with a rigid constitutional structure and a good deal of judicial review. The experience gained in making the GG. work is not likely to be thrown away.

The Distribution of Powers

In form, the GG. appears on first inspection to establish a federal system of the classic type exemplified by the U.S.A. and Australia.

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1 See especially R. J. Barnet in (1959) 45 *Virginia L.R.* 1139; Taylor Cole in (1958) 20 *Journal of Politics* 278 and in (1959) 8 *Jahrbuch des Oeffentlichen Rechts* 29. For other articles in English see Professor Cole's bibliographical note in the reference last given at p. 31, note 6. A good general account of West German government in German is Eschenburg's *Staat und Gesellschaft in Deutschland*, and the best short constitutional textbook is Maunz, *Deutsches Staatsrecht*; the latter, however, has a states-right bias, Professor Maunz being a Minister in the Government of Bavaria, which has the same cool attitude towards federal pretensions as does Texas in the case of the U.S.A. See also G. Dietze in (1960) 22 *Journal of Politics* 112.

2 Indeed, some parts of the GG. have been put beyond the reach of amendment, so that only on the occasion of reunification could there be lawful change of such fundamentals.

The eleven *Laender* (singular *Land*) now constituting the states or provinces of the Federation,[3] and the *Bund* or federal authority, are each equipped with the means of carrying on a modern government; the Bund is given a list of express powers, some exclusive [4] and some concurrent,[5] and the Laender have the undefined residue of powers [6]; Bund law overrides Land law [7]; basic individual liberties, the existence of Laender and the participation of the latter in legislation may not be destroyed by constitutional amendment [8]; other amendments may be made by the Bund parliament, but require two-thirds majorities in both Houses [9]; the Bundestag (lower federal House) represents the people as a whole, while the Bundesrat (upper federal House) represents the governments of the Laender on a delegate system, the delegates being appointed by and subject to the instructions of the Land executive governments, and subject also to recall and replacement by those governments [10]; financial resources are distributed between Laender and Bund in a manner making Bund subsidies to the Laender necessary, but giving the Laender more financial autonomy than is possessed by the Australian states.[11] Finally, the courts review the validity of legislation as well as of other governmental acts, a special responsibility for constitutional review being vested in the Bund Constitutional Court (*Bundesverfassungsgericht*), with whose doctrines this paper is mainly concerned, and which is here called the Constitutional Court.[12]

3 West Berlin is included in this count, but its relations with the Bund inevitably have many peculiarities.
4 Mainly in GG. Art. 73.
5 Mainly in GG. Arts. 74 and 75.
6 GG. Arts. 30, 70.
7 GG. Arts. 31, 72 (1).
8 GG. Art. 79 (3).
9 GG. Art. 79 (2).
10 GG. Chaps. III, IV. The Laender are not represented by equal numbers of delegates in the Bundesrat, but the differences are small and no one Land dominates the situation as Prussia did in earlier systems. Land delegates are usually ministers in the Land government.
11 GG. Chap. X.
12 The decisions are published under the editorship of the justices, with very full headnotes and excellent indices, in the series entitled *Entscheidungen des Bundesverfassungsgerichts*. This series is here cited, following the German usage, as BverfGE, but since the German custom concerning volume and page can be confusing it is not here followed; instead, the year and volume precede, and the page follows the contraction, so that the *Atom Weapon Referendum Cases* are in (1959) 8 BverfGE 104, 122. Another inconvenience in using German reports is the usual absence of short and memorable case names, itself the consequence of stressing the abstract legal issue presented rather than the parties to and facts of the dispute. It is suggested with respect that German legal writings and discussion of legal issues would be clarified and simplified if reporters would develop the habit of giving cases a real name. Some of the more celebrated decisions of the Constitutional Court have in fact acquired " pet names," mainly in the course of learned discussions—the *South-West Case*, the *Concordat Case* and so on. In the BverfGE, cases are numbered, but these numbers are little used for reference purposes and in any event are not readily memorable. In this paper the author has constructed names for most of the cases cited.

On a closer look, the structure appears more centralised than federal, for two main reasons.

First, the specific Bund powers are very extensive. The exclusive list (Article 73) covers no more than usual "federal" subjects—foreign affairs, defence, foreign trade, citizenship, migration, currency, weights and measures, federal railways, air traffic, posts and telecommunications, industrial property, federal civil service law, federal police, statistics for federal purposes—though in Australia most of these are in form concurrent. But the concurrent list (Articles 74 and 75) covers twenty-eight matters and includes the civil and criminal law, the law of association and assembly, welfare-state services, law relating to economic affairs (including industry, commerce and banking), labour law, agriculture, land law, shipping, road traffic and transport and long-distance roads, and non-federal railways. The only omission obvious to the outsider is education; a little acquaintance with German constitutional habits shows that "police" is also an important head of competence remaining mainly with the Laender, having features resembling English notions of a police force with its law-and-order powers, and others resembling American notions of "police power" as a regulatory competence. Article 72 (2) of the GG. might be thought to place severe restrictions on the Bund's concurrent legislative power, by introducing a requirement of "need" for federal action—need occasioned by the inability of a single Land to deal with the matter in question, or by the danger that action by a Land might prejudice other Laender or the entire nation, or need for legal or economic uniformity. But although interpretation of this clause is not finally settled, there is a strong judicial tendency to respect the opinion of the Bund Parliament that the required need for Bund action exists, and to confine court interference to cases of obvious abuse of power.[13]

Secondly, the administration of Bund powers is very largely in the hands of the Laender—the federal civil service is small—but the Bund is given extensive powers of directing Land authorities in the exercise of these functions. This "federal supervision" is in various ways circumscribed, or made subject to approval of the Bundesrat, with in some cases a further appeal to the Constitutional Court.

[13] See especially the *Amnesty Power Case* (1953) 2 BverfGE 213 at 224–225, the *Building Law Case* (1954) 3 BverfGE 407 at 412, and the *Land Public Service Salary Case* (1954) 4 BverfGE 115 at 127–128. Contrary views of commentators and of lower courts are cited in Hamann, *Das Grundgesetz* at 279. It is likely that the Western Occupation Powers, who particularly insisted on the inclusion of Art. 72 (2), hoped it would constitute a substantial check on federal competence, but their legal experts must have realised that the clause as finally drafted almost invited a doctrine that the "needs" specification did not raise justiciable questions. See Lassalle, *Le Fédéralisme Dans la Loi Fondamontale de la République Fédérale Allemande* (1954), pp. 18–20.

However, the result is that Bund business takes up a great deal of the personnel and time of the Land governments, and the Bund has ample powers of control over Land administration to ensure that Land execution of Bund law accords with Bund policy—as interpreted by the Bund.[14]

This looks, then, like a system quite distinct in type from the federalisms of the English-speaking world. We might call it *administrative federalism*, since not only is national law and policy, initiated mainly by the Bund, in fact chiefly administered through the Laender, but many traditional and constitutional checks ensure that the Bund is not likely to establish an extensive civil service under its own direct control. The most important check is the necessity for the consent of the Bundesrat to the establishment of new federal services at lower levels of administration, and to the issuing of many types of administrative regulations and orders.[15]

However, the Laender also serve to decentralise the creation of national policy because the structure of the Bundesrat creates a powerful Land influence in the Bund legislative process; although in general the Bundesrat has only a delaying veto,[16] it has peremptory veto powers over constitutional amendments, over administrative and financial details present in much legislation and over the redistribution of tax resources, and this is sufficient to ensure frequent practical necessity for compromise between the Bund government and parliamentary majority on one hand, and the Bundesrat on the other.[17] In this kind of federalism, the main political function of the provinces is not to generate and administer distinctive policies through autonomous legislative and administrative action at provincial level; their function instead is to generate a different political outlook from that directly represented in the federal popular House (Bundestag), so that this may influence legislative and administrative action at the *federal* level. (The Bundesrat in fact has hitherto been politically a little to the left of the Bundestag.) The continued existence of the Laender is guaranteed, then, mainly in order to ensure continued administrative decentralisation and two distinct trends of political thought in the federal legislature.

Finally there is the factor of guaranteed basic individual rights—inviolability of personality, equality before the law, equality of the

14 GG. Arts. 37, 83–85. The system distinguishes between cases where the Laender execute federal laws " as matters of their own concern," and those where they do so " as agents of the Federation."

15 GG. Arts. 80 (2), 84 (2), 85 (2), 87 (3), 108 (6), 119, 132 (4), 134 (4).

16 GG. Art. 77.

17 GG. Arts. 29 (7), 79 (2), 84 (5), 85 (1), 87 (3), 105 (3), 106 (3), 106 (4), 107, 108 (3), 135 (5). The Bundesrat has turned out to have more political significance than originally contemplated; see D. Katzenstein in 1958 *Die Oeffentliche Verwaltung* 593.

sexes, freedom of opinion and of religion, freedom of assembly and of association, secrecy of the mail, freedom of movement, freedom of avocation, right of private property, fair judicial trial—and the guarantee of a social democracy with equality of political opportunity for lawful political parties. These guarantees have no necessary connection with federalism, but they are apt to be given the most effective judicial protection under federal systems where judicial control of government action is well developed, and the protection of such interests by judicial action is also apt to create an atmosphere favourable to judicial intervention on purely federal grounds. The GG. has a particularly comprehensive set of individual [18] and political [19] guarantees, covering all the above points, enforceable against both Bund and Laender. Perhaps a political scientist might regard the administrative and policy federalism mentioned above as in part intended to create the conditions for making these guarantees effective, and might see their effectiveness as the chief ultimate purpose of the whole system.

Some Peculiarities

The distribution of legislative competence includes a concept strange to the English-speaking federations. Bund concurrent powers under Article 75 (Land public service law, press and motion pictures, nature conservation, land and water utilisation and regional planning, registration of inhabitants and identity cards) extend only to "Rahmenvorschriften"—general or guiding principles, limiting factors; the detail of these topics must be left to Land law. It is a notion with roots in the earlier German constitutions. One might have expected that this, like the limits on Bund concurrent power in section 72 (2) (which also apply to the *Rahmenkompetenz*), would involve such difficult questions of degree and of opinion as to be incapable of judicial policing. However, the Constitutional Court has undertaken the responsibility of deciding where the general ends and the particular begins. When holding invalid, as too detailed, a Bund law which set maximum limits to Land public service salaries, the court said—restating the problem rather than solving it—that Bund laws in this field must leave something to be dealt with by Land law, and the matters so left must be "of substantial importance." [20] The context suggests that the test of importance will be material rather than formal, and it will depend very much on the circumstances of the case; thus when considered abstractly an upper limit on various grades of salary may seem the very model of a "Rahmen," but a short

[18] GG. Arts. 1–5, 8–14, 33, 101, 103–104.
[19] GG. Arts. 20, 21, 28.
[20] (1954) 4 BverfGE 115 at 129.

acquaintance with salary scales under current conditions will suggest that the limits will be the salaries. It is the sort of empirical distinction which the Supreme Court of the U.S.A. would take in its stride, but would bother the High Court of Australia.

The system of fundamental guarantees includes the inevitable provisions for legislative incursions on individual liberties in the public interest, but subject to the following: "In no case may the essential content of a basic right be infringed." [21] Probably some such conception is the end-product of the process by which constitutional guarantees and legislative powers are balanced against each other in systems such as that of the U.S.A. The German provision is, however, unique in distinctly stating the problem and squarely placing responsibility for its solution on the judiciary. In application, the provision leads to interest-balancing on lines made familiar by decisions of the U.S. Supreme Court. For example, after much difference of opinion in lower courts, the Constitutional Court held in the *Case of Apothecaries* [22] that although legislative power to regulate trades and professions was wide, it did not extend to imposing discretionary *quantitative* limits on the number of chemists' shops (capable of dispensing prescriptions) allowed in a particular area, because this would constitute too grave an infringement on the freedom of trade and profession guaranteed by GG. Article 12. The court doubted whether Article 19 (2) made much difference. Similarly, it may be said that the *Veit Harlan Case*,[23] in which the Constitutional Court put limits on the inherited Civil Code provisions concerning defamation so as to preserve freedom of expression, was an exercise in the area indicated by Article 19 (2), though that Article was not mentioned in the opinion.

Constitutional lawyers in federations with an English common law background who read Articles 123–126 of the GG. will realise that their systems have easily solved, or perhaps evaded, a problem which gives frequent trouble in West Germany. This is the question whether particular parts of the complex of codes and other statutes inherited from pre-1949 Germany are now to be regarded as Bund law or as Land law. It did not occur to the American, Canadian or Australian founders that they needed to work out whether particular parts of the inherited *unenacted* law should now be regarded as federal or Dominion, or Commonwealth, as state or provincial law; the question of amending or replacing the unenacted law with statutory law was decided by reference to the general distribution of legislative competences; there

21 GG. Art. 19 (2).
22 (1958) 7 BverfGE 377, especially at pp. 408–413.
23 (1958) 7 BverfGE 198. In English law the facts would raise problems of fair comment on a matter of public interest. The defendant advocated boycotting films in which the plantiff, an actor, appeared, because of the latter's association with a Nazi propaganda film.

was little inherited statutory law which could possibly be treated as federal.[24] The assumption in all three systems has been that the unenacted law, if it had to be given a political connection, was wholly state or provincial,[25] but nobody thought of treating any of it as " unconstitutional " because if embodied in statutory form it would have fallen within an exclusive federal subject, or been inconsistent with concurrent federal law. But in a country such as West Germany with virtually no unenacted law, the allocation of inherited statutes to Bund or Land competence is demanded. The general principle is that law affecting matters within exclusive Bund power is Bund law, and so is law affecting matters of concurrent Bund power if it applied uniformly within one or more occupation zones between 1945 and 1949, or was law passed in that period which amended former Reich law. In cases of doubt, the Constitutional Court decides this question of " das Fortgelten." The question raises formidable problems of characterisation, since the earlier law was enacted by legislatures operating under a different distribution of powers, or no legally enforceable distribution at all, and hence able to put together at will provisions which would now come some under Bund and some under Land competence. It may be suspected that the Constitutional Court has sometimes solved this difficulty by attributing a single characterisation to old law which originally possessed a complex characterisation.[26] The *Rahmenkompetenz* (GG. Article 75) raises a special problem. If pre-1949 law on one of those topics constitutes a complete code, then by definition it is not a " Rahmen " law, and so cannot come within Bund concurrent power and cannot now continue as Bund law, and is therefore Land law.[27]

The Judiciary

The West German judicial system is complex, both horizontally and vertically. Most of the courts are the affair of the Laender, and in most of the Laender there are hierarchies of trial and appellate courts falling into six functional specialisations. First, the Ordinary Courts with a wide civil and criminal jurisdiction, and with the residuary

[24] *e.g.*, in Australia a few statutes of the pre-1900 Federal Council of Australasia continued in force (Commonwealth of Australia Constitution Act, 1900, Covering Clause 7), but they related to matters within federal power under the new system.

[25] *Erie R.R.* v. *Tompkins* (1938) 304 U.S. 64; Lefroy, *Canada's Federal System*, p. 127, n. 7; *R.* v. *Kidman* (1915) 20 C.L.R. 425.

[26] As in the *Small Arms Case* (1958) 8 BverfGE 143, where earlier law on inspection and control of hand firearms was treated as Bund law on the view that it dealt with firearms from an economic point of view and so came under GG. Art. 74 (11). From the history, it would appear that these laws were equally referable to considerations of safety and order—police power matters within Land competence.

[27] See the *Nature Protection Law Case* (1958) 8 BverfGE 186. Some curious questions might arise if the Bund wished to establish a completely new policy in such a field. Would its *Rahmenkompetenz* extend to *repealing* the old code, so as to enact new general principles for the Laender to complete?

jurisdiction if a more specialised resort is not available. Second, Administrative Courts concerned with cases arising from administrative action. Third, Labour Courts concerned with employment disputes.[28] Fourth, Social (Service) Courts concerned with disputes over pensions, health benefits, etc. Fifth, Finance Courts concerned with taxation disputes. Sixth, Discipline Courts concerned with offences against civil service discipline. There is a Bund Higher Court corresponding to each of these jurisdictions; as to the first five, it is a final Court of Appeal in the relevant hierarchy; the largest and most important of these, corresponding to the Ordinary Courts, is the *Bundesgerichtshof*, which is the successor to the *Reichsgericht* of the Weimar and Imperial systems and sits in many divisions. The Bund Discipline Courts are concerned only with the federal civil service. In addition, ten of the Laender have special Constitutional Courts,[29] and as we have already seen there is the Bund Constitutional Court, whose jurisdiction is shortly to be described. The Land Constitutional Courts deal mainly with questions arising under Land constitutional law.[30] One might have expected so complex a system, with no less than six ultimate federal Courts of Appeal,[31] to raise many jurisdictional conflicts and also conflicts of doctrine in the inevitable areas of overlapping jurisdiction, and indeed GG. Article 95 authorises the creation of a supreme Federal Court to ensure uniformity of judicial decision, but this court has not been created; doctrinal differences do persist, but the jurisdictional difficulties have been mitigated by judicial self-restraint.[32]

The Bund Constitutional Court derives its organisation and powers partly from the GG. and partly from the Bund statute called the *Bundesverfassungsgerichtsgesetz*, here cited BverfGG. It consists of twenty judges, sitting in two Senates each of ten; a Full Court (Plenum) sits only to decide procedural matters, such as re-allocation of cases if lists press unevenly.[33] The members are elected half by the Bundestag and half by the Bundesrat, in such a way that three

28 Not, however, arbitrating wage disputes as in Australia; collective bargaining is in force.

29 The city-Laender Bremen and Hamburg share one. Schleswig-Holstein has vested the jurisdiction in the Bund Constitutional Court, as permitted by GG. Art. 99.

30 This does not exhaust the list of courts; *e.g.*, there are the Bund Courts-Martial, the Guardianship Courts, and many disciplinary courts connected with trades and professions.

31 This includes the Constitutional Court, which is strictly a court of first instance, as will later appear; but in substance it acts as a court of last resort in matters arising under the GG.

32 Even if the projected Supreme Court were created, it is doubtful whether that court could be given authority over Constitutional Court decisions.

33 Otherwise allocation is governed by the BverfGG. When first established in 1951, the court had 24 judges; there was an intention of eventually reducing this number to 16, but in 1959 the number was settled—probably indefinitely—at 20. A Plenum was originally needed to give advisory opinions, but the power to give such opinions rested not on the GG. but on the BverfGG and was repealed in 1956.

members of each Senate, holding for life, are chosen from judges of the other Higher Courts, while the rest chosen for eight-year terms are required to have adequate legal qualifications [34]; most of them are former professors of law, Ministers or senior civil servants. (Important cases are argued mainly by professors of law; as in many other spheres, the prestige of the German private legal practitioner is not high, though it may be improving.) The court sits in Karlsruhe (as does the Bundesgerichtshof) in what used to be a nobleman's palace—an ugly Victorian pile, providing rooms inconveniently small for a numerous bench which hears cases involving a large bar and interested public. Acoustics and ventilation are bad. In short, conditions like those inflicted on the High Court of Australia, and quite unlike the Supreme Court building in Washington.

The GG. lists fifteen heads of jurisdiction for the Constitutional Court, and others have been added by Bund legislation, the most important being the individual constitutional complaint under Part 15 of the BverfGG. Here we shall summarise only the main ways in which invalidity of a Bund or Land law, or of judicial or official action, because of conflict with the GG., may be raised before the Constitutional Court.[35] They are as follows:

1. Individual Constitutional Complaint (*Verfassungsbeschwerde*) alleging that official (including judicial) action or legislation infringes the plaintiff's basic individual rights under Chapter 1 and Articles 33, 38, 103 and 104 of the GG. This has provided the great bulk of the court's lists,[36] partly because the West Germans took so joyfully to disputing government action, partly because of prolonged misunderstandings concerning the purpose of the remedy and the rules limiting its applicability (such as the time-limit of only one month from the action complained of), and partly because the taking of such action facilitated vexatious delay and attempts at forcing settlements in proceedings to which a Constitutional Complaint was collateral. Hence in 1956 the BverfGG was amended to allow each Senate of the court to appoint a

[34] GG. Art. 94 (1); BverfGG Arts. 3–7. The President presides over the First Senate and the Vice-President over the Second.

[35] The main cases not considered in the text are: the trial of seditious political parties and individuals under GG. Arts. 18 and 21; hearing of election disputes under GG. Art. 41 (2); impeachment of the President under GG. Art. 61; removal or impeachment of judges under GG. Art. 98; questions as to the applicability of international law as municipal law under GG. Art. 100 (2); questions as to whether "inherited" law now ranks as Bund or as Land law (GG. Art. 126); the residual jurisdiction as to public law (other than constitutional) disputes between Bund and Land, or between Laender, or within a Land, where no other recourse exists (GG. Art. 93 (1) 4).

[36] Professor Cole gives a count of 4,600 such complaints, out of 5,200 odd cases brought to the court from its foundation until June 1958.

standing committee of three judges, armed with the power to dismiss such complaints summarily if the question raised does not promise the clarification of a constitutional question, and if in addition refusal to take the case can cause no serious prejudice to the complainant.[37] This power has been firmly exercised, and is likely to become increasingly important as decisions of the court settle more and more constitutional questions [38]; in the Continental manner, the court tends to ask whether a question raised has been settled in principle, rather than whether the facts illustrate any difficulty in applying that principle. However, in any event constitutional complaints have produced few leading cases. On a rough count of the 291 cases reported in the first nine volumes of the BverfGE, 137 were constitutional complaints, and of those 110 were rejected, while of the 27 upheld 16 were on the ground of lack of fair hearing before a lower court, producing an order for fresh hearing in that court.[39]

2. If another court considers a law whose validity is relevant to its decision is *invalid* because of infringement of the GG., or (in the case of Land law) because of inconsistency with Bund law, the proceedings are stayed until a decision as to the validity of the law in question is obtained from the Constitutional Court.[40] This has been the second most prolific source of cases—more than fifty of those in the first nine volumes of BverfGE. But as with the constitutional complaints, a large number have been dismissed on procedural grounds, showing the slowness with which even the judiciary have become accustomed to the new remedies. This is the head of jurisdiction which more than any other has led to the belief that the Constitutional Court has a monopoly of constitutional decision. However, it should be observed that all courts have the power to hear and determine cases (otherwise within their competence) in which a constitutional issue arises, to the point where they cannot proceed unless that issue is decided; they can and must then proceed to *consider* the constitutional issue; they have full authority to *decide* it *if their decision is in favour of validity.* (Land *Constitutional* Courts have this further restriction on their competence, that even a decision *in favour* of validity of a

37 BverfGG Art. 91a. The committee can dismiss only if unanimous.
38 See (1959) 9 BverfGE 2.
39 German procedure prior to the GG. permitted summary action by courts, without notice to the parties affected, more freely than is now regarded as consistent with GG. Art. 103 (1).
40 GG. Art. 100 (1).

challenged law must be referred to the Bund Constitutional Court if the Land Court proposes to interpret the GG. differently from an existing interpretation by the Bund Court or another Land Constitutional Court.[41]) Thus German commentaries on the GG. contain numerous references to decisions of courts other than the Constitutional Court—decisions showing the scope of action *permitted* by the GG., and since the Constitutional Court has no *appellate* jurisdiction in the strict sense, it is impossible to have these decisions in favour of validity considered in the Constitutional Court unless a basic individual right is infringed, or unless independent action is brought by some government or political agency under the next heading. On references from other courts, the Constitutional Court decides only the question of constitutional validity involved; the matter is then sent back to the referring court for final decision of the whole case.[42]

3. Applications by the Bund or a Land government or by one-third of the members of the Bundestag for the resolution of differences of opinion or doubts as to the compatibility of Bund or Land law with the GG., or of Land with Bund law.[43] This is the jurisdiction which the Germans regard as pre-eminently " abstract norm control," and is also the one which has produced most of the leading decisions of the Constitutional Court. The requirement of a " difference of opinion or doubt " distinguishes the situation from the pure advisory opinion, but the significance of the requirement has not had to be explored with care, since in the cases hitherto reported there has been a substantial and genuine " difference " between governments, or government organs, or parties within the Bund parliament. Indeed, with one exception an Australian would question whether the procedure is any more " abstract " than suits between Attorney-General of the Commonwealth and Attorney-General of a state in the Australian system[44]; there is little the Germans do which cannot be done in Australia by applications for declaration or injunction. The exception is the application by a third of

41 GG. Art. 100 (3). There is also a small and decreasing class of laws ante-dating the GG. as to which the Bund Constitutional Court claims no jurisdiction, and the jurisdiction of other Courts is accordingly unlimited; see Hamann, *op. cit.* pp. 350–351.

42 Thus the system will remind lawyers in many British jurisdictions of certain forms of appeal by case stated. Compare the Australian procedure under Commonwealth Judiciary Act, ss. 40 and 40*A*, whereby cases with a constitutional element are removed from State Supreme Courts to the High Court and there determined as a whole.

43 GG. Art. 93 (1) 2.

44 Discussed 6 *Journal of Public Law* (U.S.A.) 491–492.

the members of the Bundestag, but that is unfamiliar only because the Australians have adopted the English tradition and assumption that the legislature and its parties are not persons with *locus standi* in public law; there is no logical reason why they should not be so regarded, though there may be some practical advantage in denying to a parliamentary minority such facilities for carrying the parliamentary battle directly into the courts. This head overlaps in practice with another which the Germans do not regard as "abstract," namely determination of "differences of opinion as to the rights and duties of the Federation and the Laender," [45] where in the view of commentators, a concrete controversy is required.[46] But there can be very few cases under the latter head which do not also involve questions of compatibility of laws with the GG., and so come under the "abstract" head as well.[47]

4. Decision of disputes concerning rights and duties of a higher Bund "organ" and of authorities, persons or groups given autonomous rights by the GG. or by the Standing Orders (*Geschaeftsordnung*) of a higher Bund organ.[48] This also requires a concrete controversy; it may sometimes overlap with abstract norm-control, but has a more far-reaching effect because both German constitutional traditions and the provisions of the GG. treat so many public bodies as having the required independent standing, and also attach constitutional significance to such a wide variety of "Standing Orders." Particularly important has been the ruling of the Constitutional Court that political parties are "organs" within this provision, and so have standing to challenge, for example, the validity of election laws alleged to infringe the guarantee of "equality of electoral chance" which the court has implied from the GG.[49] Article 21 of the GG. states in categorical terms the basic importance of political parties in the system, and to some degree regulates their constitution and activities, so providing an ample constitutional basis for the view taken by the Constitutional Court; nevertheless, it may be speculated that a British, Australian or U.S. court would not have attributed to Article 21 quite so far-reaching an effect, because of the tradition of regarding parties as private voluntary

45 GG. Art. 93 (1) 3.
46 Hamann *op. cit.* p. 335.
47 See (1951) 1 BverfGE at 30.
48 GG. Art. 93 (1) 1.
49 (1954) 4 BverfGE 27.

associations.[50] Similarly, one balks at the notion of a court holding Parliamentary Standing Orders invalid on constitutional grounds, at the suit of a political faction, on the ground that they infringe the rights of members to initiate bills—though a specific guarantee of this right is easily spelled out of GG. Article 76.[51]

The Impact of Judicial Review

The threat and the use of judicial proceedings as an aspect of party warfare have played a considerable role in the politics of West German federalism, but an analysis of the 291 decisions reported in the first 9 volumes of BverfGE covering the period 1951–mid 1959, shows that judicial decision has not had an unduly destructive effect on legislative policy.[52] In that period the Constitutional Court made holdings of invalidity in thirty-eight cases, in four of which substantially the whole of a law was invalidated, while the rest related to particular sections or subsections. Twenty-one of these cases dealt with Bund and seventeen with Land laws. In four, Land law was invalidated for inconsistency with Bund law. In only ten did the invalidation rest on simple lack of competence in the legislating authority arising from the distribution of legislative competence in the GG., and of these four dealt with Bund and six with Land law. In six (four Bund and two Land), invalidation was on separation-of-powers grounds, chiefly delegation of legislative power in terms held insufficiently precise. In the remaining eighteen (thirteen Bund, five Land) invalidity was based on infringement of the guaranteed rights of individuals or groups. Nine of these related to one aspect or another of equality before the law, or equal protection of the laws.

This distribution also confirms the *a priori* expectation that simple lack of power is unlikely to affect the Bund seriously, but is more likely to affect the Laender, and that "fundamental guarantees" are more likely to provide the occasion for judicial intervention with both Bund and Laender. In these respects the record of judicial review resembles more closely that in the U.S.A. than that in Australia, though with a little more occasion for attention to the distribution of legislative competence than has been required from the Supreme Court of the U.S.A. in the same decade, and with a total impact on *federal* law approaching closer to the Australian position.

As against this record of invalidations can be set the figures from

50 *Cameron* v. *Hogan* (1934) 51 C.L.R. 358.

51 (1952) 1 BverfGE 144; *cf.* (1959) 10 BverfGE 4.

52 The following counts are approximate and the allocation of decisions to one category or another is often difficult. For a discussion of the difficulties and for a similar count of Australian decisions, see author's paper in (1958) 6 *Journal of Public Law* (U.S.A.) 483.

the same run of reports for holdings of *validity*. In sixty-seven cases, challenges to the validity of laws were dismissed on grounds going to the substance of the relevant power or prohibition—forty affecting Bund and twenty-seven Land laws. It should also be noted that in the cases of invalidation mentioned above, the attack was often more far-reaching than the decision against validity, so that those decisions frequently involved some holdings in favour of validity. Moreover, these propositions about *validity* holdings have a more specific significance in the German system than they do in the federations of the English-speaking world, because of the application of two traditional German legal ideas in this field. First, the Constitutional Court regards itself as required by the nature of its office to consider the whole of an interrelated set of legal provisions brought before it, and all the grounds which may be urged against validity, whether the pleadings or arguments of the parties to the litigation raise distinct issues of invalidity in relation to all those provisions or on all those grounds or not.[53] Of course if the case concerns sections of very long statutes such as the Civil or Criminal Codes, the court will not undertake to examine the whole code, but the scope of its inspection is usually wider than an Australian or American court would undertake. Secondly, Bund law authorised by the GG.[54] gives certain decisions of the Constitutional Court, including those under abstract norm-control, " statutory force " [55]; this is confined to the formal order of the court, which is published in the Government Gazette, but even the formal order frequently contains specific declarations that a challenged law is valid, and so acquires the effect of a decision *in rem* —binding the world.

Some Judicial Doctrines

In many respects the jurisprudence of the Constitutional Court contains no surprises for the student from the English-speaking world. The court claims it is concerned with legal validity only, not *zweckmaessigkeit*.[56] Interpretation is seen to involve reading statutes, including the GG., as a whole.[57] Invalidity involves problems of

53 The *South-West Case* (1951) 1 BverfGE 14 at 36–37, 64–65; *Case of Ex-Nazi Officials* (1953) 3 BverfGE 58; the *Retired Denazification Officials Case* (1955) 4 BverfGE 219 at 243; the *Case of Apothecaries* (1956) 5 BverfGE 25. This follows partly from the German tradition that courts actively control their cases and are not dependent on the initiative of the parties as in the English system, but the Constitutional Court also regards itself as in a special degree responsible for settling all the constitutional questions inherent in a case.

54 GG. Art. 94 (2); BverfGG Art. 31.

55 " Gesetzeskraft." Even decisions not so treated are binding on all " constitutional organs, courts and officials."

56 The *South-West Case, cit.* n. 53 *supra.* This was the first major case before the court which took the opportunity of laying down a long series of such general maxims.

57 *Ibid.*

severability which are solved along lines made familiar by Australian High Court and U.S. Supreme Court decisions.[58] Invalidity, if established, operates *ab initio*.[59] There is a fairly strong presumption of validity.[60] Legislation is characterised partly by legal operation and partly by classifications and collocations familiar in past legislative usage—of course *German* usage, not necessarily the same as elsewhere.[61] *Expressio unius, exclusio alterius* and *generalia specialibus non derogant* pursue their rather erratic way.[62] The separation of powers is not regarded as involving absolutes, and there must be areas of overlap, but an attempt is made to isolate the essence or core of the respective functions.[63] In handling inconsistency between Land and Bund laws, the Germans recognise under the name "codification principle" what the Americans call "pre-emption" and the Australians "covering the field."[64] In the Continental manner, free use is made of constitutional and legislative history, *travaux préparatoires*, and the debates of constitutional assemblies and parliaments—even freer use than is customary in the U.S.A.[65] In what follows, attention is drawn to some general conceptions which, for the Australian observer at least, have unusual features.

The Constitutional Court, like the U.S. Supreme Court and the Australian High Court, regards "federalism" as itself supplying a general guide to the construction of the Constitution, but the Constitutional Court's formulation is a little more specific than that of the other two courts. The German court expresses it in the principle of "federal good faith" (*Bundestreue*) or "federal friendly behaviour" (*bundesfreundlichen Verhaltens*).[66] Some of the theoretical formulations of this principle are very wide indeed: "In a federal state, nothing should be allowed to happen which injures the whole or a part"; "if a Land legal regulation has consequences beyond the territory of the Land, the Land parliament must have regard to the interests of the Bund and of the other Laender, and obvious abuse of Land power in breach of this principle is a breach of the Constitution."[67] The Constitutional Court quotes as its source Rudolph Smend's essay of 1916 on "Unwritten Constitutional Law in a

58 The *Price Control Case* (1958) 8 BverfGE 274.
59 The *South-West Case, supra.*
60 *Ibid.* esp. pp. 32–33; the *Affiliation Case* (1958) 8 BverfGE 210.
61 The *Building Law Case* (1954) 3 BverfGE 407; the *Press Law Case* (1957) 7 BverfGE 29.
62 *Case of Professional Tribunals* (1954) 4 BverfGE at 83, *Press Law Case ut. cit.* at pp. 42, 44; *cf.* the *Baden Restoration Case* (1956) 5 BverfGE at 43.
63 The *Bremen Public Service Arbitration Case* (1959) 9 BverfGE 268.
64 The *Land Holiday Laws Case* (1958) 7 BverfGE 342.
65 *Passim*; note, *e.g.*, the *Case of Ex-Nazi Officials* (1953) 3 BverfGE 58.
66 Three judges of the court expressed to the author their preference for the latter phrase.
67 The *Concordat Case* (1957) 6 BverfGE at 361. These dicta emphasise Land duties but the principle applies equally against the Bund.

Monarchical Federation" [68]; Smend in turn quoted Triepel (1907),[69] and Triepel attributes his view to Bismarck, without giving a specific source. Now it is easy to see that as a general maxim of political morality, influencing the mutual relations of the Prussian King-Emperor and the princes of the German States in the German Reich from 1870 to 1918, this was a useful and fruitful generalisation. Its application there, however, depended largely on personal ties between individuals sharing a more or less well-defined aristocratic—almost feudal—concept of honour.[70] In a modern *Rechtsstaat* where the relations are between democratic legislatures and executives, in terms of objective rules of law rather than personal ties, the whole principle needs to be transformed, and it may be doubted whether in that setting it is not altogther too vague and unpredictable in its consequences. In that setting, *Bundestreue* comes under the criticism which this writer has elsewhere made of Australian High Court attempts at erecting "federalism" into an independent legal concept.[71] There is too much danger of the court imposing its own theory of what a federation should be, instead of accepting the definition of the particular kind of federation which the founders have, by definition, embodied in the particular constitution; the structure of federal constitutions and their drafting history always leave plenty of room for constructive judicial interpretation, but the process is likely to be more consistent with legal security if it proceeds from more detailed premises than the doctrines of *Bundestreue*, or of the *State Banking Case*.[72] So far, the principle has not formed a substantive ground for invalidating a law, but it played a procedural part in the *Hessen Atom Weapon Referendum Case*,[73] justifying an order to a Land government to restrain unconstitutional activity by a Land local authority. The principle could have been applied in the *Concordat Case*,[74] where the Bund sought to invalidate a Land law on schools inconsistent with an international agreement binding on the Bund, but the court declined to apply it because to do so would have imperilled Land control of education.

Even more general than the doctrine of *Bundestreue* is a judicial

68 In *Festgabe fuer Otto Mayer*; see the *Bund Housing Aid Case* (1952) 1 BverfGe at 315.

69 *Unitarismus und Foederalismus im Deutschen Reich*, p. 267.

70 Smend was mainly concerned to urge on Prussia the duty to remain a monarchy, provide the federal Emperor, and lead the rest, but to do so in a spirit of comradeship rather than of domination.

71 (1948) 4 *Res Judicatae* (Melbourne) 15.

72 (1947) 74 C.L.R. 31.

73 (1958) 8 BverfGE 122. The court held that owing to the exclusive Bund competence as to national foreign policy and defence, it was not competent to a Land local authority to hold a plebiscite intended to exert public pressure on policy in relation to such matters. The Land, not the local authority, had been impleaded.

74 (1957) 6 BverfGE 309.

tendency to adopt natural law theory, and to treat the GG. as merely carrying into effect prior principles which have prior validity.[75] This has particularly attracted the attention of American scholars,[76] and here I shall make only two comments. First, the court has hitherto been able to assume that the principles required by " suprapositive law " are in fact fairly adequately expressed in the GG.; by regarding such principles as " behind " the instrument, the court may have been encouraged to exercise greater freedom in making implications from its text—for example, when constructing a principle of equality of opportunity for political parties out of " equality before the law " under GG.3 and freedom for political parties under GG.21—but the same feat could be performed on less metaphysical principles. Secondly, this author agrees with the view of Professor Cole [77] that since 1953 the Constitutional Court has talked progressively less in such terms.

The Constitutional Court has been concerned to defend itself against suggestions that in protecting individual liberties from legislative encroachment, it is advocating any particular *economic* theory, or attributing an economic theory to the GG. It regards the system as in principle " economically neutral ": hence, for example, it held valid Bund laws which in the early days of the " economic miracle " levied capital charges on some enterprises in order to make what amounted to forced loans to facilitate the reconstruction of basic industries.[78] However, the GG. has in fact a bias towards a private enterprise system, as shown by the specific guarantee of " property and the rights of inheritance," [79] the " essential content " of which must not be infringed. The court can hardly help developing this bias, as shown in the case concerning quantitative restrictions on apothecaries' shops,[80] and in the case concerning requirements that milk vendors must have a specified minimum volume of trade in order to be licensed to carry on business.[81] Both laws were held invalid as infringing freedom of avocation. The court here has had to construct a doctrine which distinguishes between degrees of regulation. It admits a wide legislative discretion to regulate trades and professions on grounds of health and safety,[82] but rejected the legislative and administrative view that limitation of numbers in the relevant occupations was itself a step towards effective supervision; the assumption is

[75] *South-West Case* (1951) 1 BverfGE at 32.
[76] Especially G. Dietze in (1956) 42 *Virginia L.R.* 1.
[77] 8 *Jahrbuchdes Oeffentlichen Rechts* at 43–44.
[78] (1954) 4 BvergGE 7.
[79] GG. Art. 14. The Article also recognises the social duties of property.
[80] *Supra,* note 22.
[81] (1958) 9 BverfGE 39.
[82] *e.g.*, fixing an age-limit for midwives: (1959) 9 BverfGE 338—an example of a Constitutional Complaint raising an important issue.

Spencerian, and strongly reminds the Australian observer of the assumptions on which the Privy Council and the High Court have reconstructed the guarantee of interstate free trade in section 92 of the Australian Constitution.[83]

As indicated by the statistics above, "equality before the law" looks like playing the major role which "due process" has in the U.S.A., and in addition to many penetrating opinions of the Constitutional Court we have on this topic a book,[84] and an article in English,[85] by one of the court's justices, Professor Gerhard Leibholz. The problem is to decide what is a significant difference between apparent equals. The GG. itself declares some differences in fact to be legally irrelevant; for example, as between the sexes, "es lebe der Unterschied" is no longer an adequate plea.[86] Here attention is drawn only to one point of particular interest. The Constitutional Court has refused to treat differences of interpretation of the same law by different courts, or by the same court on different occasions, as creating "inequality."[87] If the court had ruled otherwise, it would in effect have created a new jurisdiction for itself—namely that of establishing in any branch of the law the true view on disputed points, so making quite unnecessary the projected Bund Supreme Court.[88] Yet the plaintiffs in such cases would seem to have as substantial a grievance against the operation of the legal system as those who have succeeded in complaints that statutes which originally laid down an "equal" rule—*e.g.*, as to compensation for redundant civil servants—have afterwards been amended so as to worsen the terms for later members of a relevant group as compared with those dealt with before the law was amended.[89] How far can such a principle go? Is it unconstitutional ever to *increase* a fixed statutory penalty for a particular criminal offence?

In the area of fundamental guarantees, where previous German experience has been scanty, and perhaps over the whole area of constitutional interpretation, one might have expected the Constitutional Court to make more use of the experience of other federations,

83 See especially *Hughes and Vale Pty. Ltd.* v. *N.S.W.* (*No.* 2) (1955) 93 C.L.R. 127.
84 *Die Gleichheit vor dem Gesetz* (1959).
85 (1954) 3 *Journal of Public Law* (U.S.A.) 156.
86 GG. Art. 3 (2); (1959) 10 BverfGE 59.
87 (1951) 1 BverfGE 82; (1954) 4 BverfGE 1.
88 See *supra*, p. 33.
89 (1955) 4 BverfGE 219; (1957) 6 BverfGE 246. In Australia, there have sometimes been speculations as to the consequence of unconstitutional discrimination (as under s. 99 of the Constitution); to hold invalid the *whole* of a statute conferring benefits, or even the part conferring an *inadequate* (and hence discriminatory) benefit, will not help the relevant plaintiff. The German court has courageously solved this problem by indicating to the Parliament the omission whose rectification will remove the discrimination, without holding any of the existing provisions invalid, and the Parliaments have hitherto acted accordingly. *Cf. James* v. *Commonwealth* (*No.* 1) (1928) 41 C.L.R. 442.

and to show familiarity with decisions of the U.S. Supreme Court, the Judicial Committee of the Privy Council, the Supreme Court of Canada and the High Court of Australia, as being the courts of the world with the most extensive body of federal *Rechtssprechung*. Many individual Justices of the Constitutional Court have an excellent knowledge of English, and several have spent periods of study in England and the U.S.A. and have some familiarity at least with American decisions. In their reported decisions to this writing, however, this author has not noticed a single reference to a judicial decision of the English-speaking world, and only two references to any sort of English-language source.[90] This may be partly due to the different German (and Continental) tradition concerning sources generally, in particular the greater reliance on learned commentaries. However the Constitutional Court freely refers to its own decisions, and has even been compelled for technical reasons to arrive at some view as to what constitutes a *ratio decidendi*.[91] One may conjecture that more important has been a desire to build on German sources, so as to avoid the accusation that the GG. has been imposed by foreign conquerors.

Certainly the overwhelming impression of this author, after studying the sources for a year at the Max Planck Institute for Public Law at Heidelberg,[92] is that West Germany's statesmen and jurists have succeeded extraordinarily well in blending many German traditions when creating their Basic Law; although the system as a whole is strikingly different from anything that went before, the parts of which it is composed, piece by piece, can be related to German experience, and the language in which it is expressed is unintelligible without reference to that experience. This Constitution is not, like the present Japanese one, in the main a translation from the English. Perhaps as the system gains maturity and its expositors feel more confidence in its stability, the Germans will be able to make wider use of the jurisprudence of other federal countries. Those other countries can in turn learn much from the federal jurisprudence of the *Bundesrepublik*.

90 To Campion's "Introduction to the Procedure of the House of Commons" (in 1 BvergGE at 156) and to a dictum by Cardozo J. (no source given) in 7 BverfGE at 208.

91 *e.g.*, in order to decide whether a Land Constitutional Court proposes to differ from the decision of another court under GG. Art. 100 (3); (1954) 3 BverfGE 261.

92 To whose Director and Staff are due thanks for hospitality and help during the collection of this material.

THE RELUCTANT EXECUTIVE

JAMES T. CRAIG

A RECENT article implies that the doctrine of separation of powers may still have virtue, and suggests that political scientists may have been too successful in urging the defects of the concept as a constitutional norm.[1] If the doctrine has any virtue it surely must possess it in relation to a system in which the fundamental protections are ultimately afforded by a supreme legislature rather than by a written constitution, and this remains true even if, as one writer puts it, " the separation of persons is a more real basis for the avoidance of tyranny and a greater safeguard against maladministration than the separation of powers." [2]

It may well be true that political scientists—as well as lawyers—have substantially aided the discrediting of the doctrine, but much of this has been a symptom rather than a cause. The doctrine has been invoked to challenge developments which were, and are, the results of social forces, and a combination of defeat and retreat in the face of those forces and, ultimately, a realisation of the inevitability of the consequences of such developments, has been used to display the apparent sterility of the doctrine. Increasing executive discretion has emerged—in the form of legislative powers and the control of adjudicative functions—because of the changing social conditions, requirements and standards [3]; and the ends that such executive discretionary powers were meant to achieve would still require satisfaction whether or not the machinery to satisfy them conforms to a particular constitutional norm. The doctrine of separation of powers has been used to impugn the machinery evolved and, in the face of the needs and social aspirations of the community together with a lack of sufficiently distinguishable alternative devices, the doctrine has become submerged. When it started to disappear there was no lack of help to

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1 Geoffrey Marshall, " Political Science and the Judicial Process " [1957] *Public Law* 139 at 152.

2 [1957] *Public Law* 89.

3 See also Lord Chorley, " Law-making in Whitehall " (1946) 9 *Modern Law Review* 26, *e.g.*, " In order to carry out the new social policy, which it must always be remembered was not the invention of the executive but the demand of the people, it required an elastic authority which would enable it to mould its performance to the working requirements of the policy " (p. 27).

push it under. The measure of error is not to be found in the initial mistake of trying to oppose social forces by a somewhat unrefined concept more appropriate to an era of less comprehensive and complicated administration, but in its wholehearted abandonment when its uselessness in one context became so apparent.[4] An attempt to refine the concept and to apply its tenable propositions to the modern complexity of administration might have been more profitable than an outright dismissal of the concept which, somehow or other, tends to receive abuse in direct proportion to the incidence and extent of executive depredations of parliamentary authority.

The social forces which rode roughshod over the doctrine neither destroyed its element of truth nor completely cast out its value. Those social forces merely moved the focus of the problem and altered its context—perhaps more relevantly for the political scientist than for the lawyer[5]—but the energies were being dissipated denigrating the doctrine, and even a realisation that there was a problem of ensuring adequate control over the extensive and increasing executive discretionary powers, without inhibiting the fulfilment of the social aspirations for which these powers had been created, did not express itself in any substantial appreciation that the doctrine could still be of use, even in the much more sophisticated situation. The purpose of this analysis is to demonstrate that the doctrine of separation of powers still has merit, at least as a conceptual aid in the examination of the problem of the control of executive discretionary power. It is submitted that the focus of the problem is not simply control. The problem is *controlling the control.* In Britain the executive is primarily responsible for the *existence* of the control; it is responsible for the *extent and nature* of the control when such exists; it is responsible for the *application or exclusion* of the control in particular instances; it exercises legislative power *modifying the nature and application* of the control; and it exercises adjudicative functions in issues

[4] In criticising Dr. Allen's notion that a lack of "balance of powers" jeopardises liberty, Lord Chorley represents this extreme position when he asserts that, ". . . the division of powers is, or should be, purely a matter of convenience in a unitary State. Power . . . will be allocated in the way which best suits the interest or convenience of the dominant class or groups in society" (*ibid.* p. 30). And Sir Hartley Shawcross seemed to advance a similar view in his Address to the Haldane Society, "The State and the Law" (1948) 11 *Modern Law Review* 1 at 1–2.

[5] One of the difficulties may be that the training and background of political scientists tend to make them more interested than the lawyers in the kind of value-judgments involved but, as the focus of the problem shifted and involved greater legal complexity, they, unlike the lawyers, were not equipped for this—the *situs* of the problem was in a kind of "no-man's land." Although there are advantages in the British tradition, as opposed to certain continental schools, of political science not being in the hands of the jurists, this particular problem may well emphasise the need for a considered and considerable law training *in* law schools and *by* lawyers for those pursuing studies in political science.

concerning the controls. It is at this level that the doctrine of separation of powers can be of aid—and of salutary aid.

Executive power largely rests, in the British constitution, on the unique position and authority of the executive in the initiation of legislation. This is the cornerstone of executive control, and the following examination illustrates certain aspects of this by reference to two modern statutes concerned with executive discretionary power and privilege, namely, the Statutory Instruments Act, 1946,[6] and the Crown Proceedings Act, 1947.[7]

The Initiation of Legislation

The development of the British constitution has been such that the executive enjoys a near-monopoly of initiating legislation. Indeed, one writer provides a useful distinction in the matter of legislating when he says: "In other words, 'to legislate' may mean either to authorise the action which turns a legislative proposal into a law or to carry through the whole legislative process. In this latter sense, legislation today is more a Governmental than a Parliamentary function."[8] It is true that this situation is conducive to leadership from the government and perhaps also removes the temptation for Members of Parliament to introduce parish-pump legislation in order to favour or impress their constituents. This system perhaps also permits a fuller exploitation of the experience and skills of the permanent administrators in the constructive task of reform. Although this situation has been brought about by changing social and political requirements and is exemplified by the characteristics and influence of the modern political party, it remains true that the balance of advantage may well lie in the executive enjoying this strong position regarding the initiation of legislation. But whatever may be said for it in terms of general policy, the system has one grave inherent weakness. This weakness is to be found in the initiation of legislation to restrict, regulate or in any way control by legal process the exercise of executive discretionary power.

Whatever may be the needs of the community in terms of a strong or dominant executive, it is clear that it is a matter of the utmost difficulty to maintain an equilibrium, whether dynamic or static, and at whatever degrees of independence or interdependence, between the executive on the one hand and the legislature and the judiciary on the other, if the executive is in a position, not merely to substantially determine the relationships, but to have an almost exclusive right to initiate changes in the relationships. It does not require great

[6] 9 & 10 Geo. 6, c. 36.
[7] 10 & 11 Geo. 6, c. 44.
[8] J. A. G. Griffith, "The Place of Parliament in the Legislative Process (1)," (1951) 14 *Modern Law Review* 279 at 291.

perception to appreciate that the administrators, whatever their probity, ability, devotion to duty and keen sense of fair play and justice,[9] may manage a somewhat closer identity of administrative convenience with community good than many persons outside the administration, some of whom, it is reasonable to assume, may also be endowed with those moral qualities so often attributed to our permanent officials. And it follows that an administration, pressed to initiate legislation designed to restrict its freedom of action, may be somewhat reluctant to pursue this path very far or with resolution, stoutly defending its position to the point of evasion. The administration regards its discretionary powers as essential not only for efficient administration but also for the good of the community, and it seems equally certain that the administrators consider that such powers are exercised reasonably and fairly. The consequence of this is for the administration to tend to view further limitations or subordination to legal process as detrimental to the community as well as rendering administration less effective and efficient. Whatever substance there may be in this view, the administration, by virtue of its interest, is not in the best position to judge the balance of advantage, and it is a defect of the system that the administration should be in a position to determine where the balance should lie.

This point can be taken without suggesting that the executive is never in the best position to judge in matters of general policy or, alternatively, the point is consistent with the view that in matters of general policy the balance of advantage may often lie in allowing the executive to judge. But this cannot apply where the discretionary powers and privileges of the executive are involved. In short, there is a fundamental difference between the nature of the Statutory Instruments Act, 1946, and the Crown Proceedings Act, 1947, on the one hand, and the Road Transport Lighting (Amendment) Act, 1958,[10] on the other—and it is not resolved by taking the former on the floor of the House at the committee stage.[11]

It remains true, of course, that the legislature ultimately can control

9 Qualities attributed to civil servants by Sir Hartley Shawcross, " The State and the Law," *op. cit.* p. 8. These qualities are very often attributed to our public servants, particularly if the political element of the executive is under fire.

10 6 & 7 Eliz. 2, c. 22.

11 In any case, it should be remembered that the decision whether or not a measure is of a first-class constitutional significance and therefore to be considered by a committee of the House instead of one of the Standing Committees is substantially in the hands of the executive, and reasons other than any constitutional criterion—such as the state of the legislative time-table and Opposition opportunities—are not likely to be ignored. See Herbert Morrison, *Government and Parliament* (O.U.P. 1954) on this point, p. 208 *et seq.*

Unlike the Crown Proceedings Act (which was introduced in the House of Lords), the Statutory Instruments Act was dealt with by a Standing Committee which, it is pleasant to note, was responsible for the only " teeth " contained in the Act (s. 3).

the fate of an executive and, in the last resort, wields the power. But it is not the task here to consider the limits at which this final sanction would operate, or to consider the relationships of those limits or their variations at particular periods and under differing circumstances. It is sufficient to note that Parliament can, at some stage, apply the ultimate sanction. It is also wise to note that the executive usually displays considerable reluctance to test those limits, and consequently seeks to achieve its ends with a comfortable but ill-defined margin of safety within the limits.[12] But the British administration has a long tradition of skill, subtlety and patience—not to mention the weight of its resources compared with those of private individuals or Members of Parliament—and by the use of various devices can exploit whatever limits there may be to the uttermost. This feature is plain whenever the executive is under pressure to limit its privileges or control its discretion, and examples of this are to be found in an examination of certain aspects of the Statutory Instruments Act, 1946, and the Crown Proceedings Act, 1947. While it is not suggested that these reforms have been of little or no value, they provide useful illustrations, particularly if regarded from the long-term point of view, of an administration achieving maximum relief by the minimum of reform. Quite apart from other criticisms, one grave defect of both these Acts is that *positive provisions* are necessary in later statutes to bring these within the operative provisions of the principal Acts, and absence of such provisions can continuously and persistently reduce the scope of the principal Acts compared with their apparent extent when first introduced. And all this depends on the executive enjoying the almost exclusive right to initiate legislation.

Failure to Initiate

It is a simple matter of experience that it is easier to restrain a person or institution from certain conduct than it is to compel a particular course of conduct—and to compel it to be followed thoroughly and effectively. The executive, having a near-monopoly of initiating legislation, can afford to resist considerable pressure from Parliament and the country at large to introduce legislation that it is reluctant to introduce. In addition to forthright refusal to act, which may or may not be accompanied by reasons such as lack of parliamentary time or the unreadiness of the community for the particular measure urged, there are more subtle manoeuvres such as the establishment of some kind of investigating machinery. This is not to suggest that Royal

[12] On the few, but notable, occasions on which the executive has retreated before Parliament, although the retreat is usually accompanied by pronouncements calculated to display the highest reverence for parliamentary institutions and the greatest respect for parliamentary wisdom, it is perhaps safe to assume that practical expediencies have had as much weight as ideological considerations.

Commissions or departmental committees are purely delaying tactics. Provided the terms of reference do not prostitute the avowed objects of such machinery, they can do much good by providing accurate and substantiated factual evidence and often a balanced view of the problem and alternative remedies. This, however, makes delay inevitable and the executive's refusal to initiate legislation logical and defensible. Unfortunately, by the time the factual evidence and the balanced views are available the public zeal on the particular issue is often as negligible as the government's intention to act on the report. And the more complex and controversial the subject, the longer the delay is likely to be. Indeed, a different political party may be in office and it will not even have the embarrassment of past promises in the matter, either implied or explicit, because it seems tacitly accepted by the parties that promises made or implied by an Opposition when criticising the Government are far from binding when in office. In any case there is always the plea of changing conditions, the dynamic quality of modern affairs and the flux of opinion among the responsible and well-informed. Whatever the formula the result is the same. If the pressure is sufficiently reduced the Government will do as little as it was willing to do in the first instance, but the circumstances for this may now be much more favourable.

It cannot be denied that substantial benefits often accrue to the community and the institutions of representative government by such a system, however distastful such evasions appear when tested by standards of personal morality, but even with the pragmatic approach a distinction must be drawn between matters of general policy and matters pertaining to executive privilege or the exercise of discretionary powers. The Statutory Instruments Act, 1946, only reached the Statute Book after a generation of pressure from many sources, a devastating attack from a Lord Chief Justice,[13] a strong report from a committee,[14] repeated criticisms from the bench, and the effects of a country being engaged in armed conflict during which time the executive enjoyed greatly increased powers, and the potentialities of an executive with the powers and privileges of the British executive were the more readily seen. And the Crown Proceedings Act, 1947, only reached the Statute Book after a similar kind of history plus the "circumstances which would expedite a change."

The Limits of Reform

The passage of time, coupled perhaps with an increase in executive discretionary powers and a corresponding increase of pressure for

[13] Lord Hewart, *The New Despotism* (1929).
[14] Report of Committee on Ministers' Powers, April, 1932, Cmd. 4060.

reform, and sometimes, more important, a fortuitous set of circumstances which arouses interest and creates pressure for reform, may compel the executive to abandon the first lines of defence.[15] If a commission or committee has already reported there is perhaps no alternative to government action and the introduction of a Bill.[16] However, as the conception of what is to be done and the methods of doing it are in the hands of the executive it is not surprising that such proposals do not always go in the right direction and seldom go as far as they might. It remains true, however, that there is a tradition of stage-by-stage reform in Britain and there may have been occasions in the past to be thankful for an apparently over-cautious government restraining a too sudden advance. Not only this, but the executive is sometimes in a strong position to be the best judge of the consequences of a particular course of action and to settle the limits of advance at a point where the law of diminishing returns does not ensure small advantage from major change. But even accepting all this without qualification in matters of general policy—and there are many obvious qualifications—the motives of the executive must be suspect when the reform in question concerns its own powers and privileges, and it is unlikely to be the best judge where its own interest is so well centred. It may be argued that the balance of advantage lies so often with accepting the view of the executive that the consequences of the executive imposing its will on Parliament, by whatever means, is the best practical solution. It would appear that this has been the view of the executive on certain occasions.

In *Blackpool Corporation* v. *Locker*,[17] Scott L.J. concerned himself with the fundamental nature of the need to print and issue subordinate legislation and the position of sub-delegated legislation under the Statutory Instruments Act, 1946. He said: ". . . if the power delegated to the Minister is to make sub-delegated legislation and he exercises it, there is no duty on him, either by statute or by common law, to publish his sub-delegated legislation." [18] He further suggested that

[15] All this is well illustrated by the events leading up to the passing of the Crown Proceedings Act, the "circumstances which would expedite a change" being those of *Adams* v. *Naylor* [1946] A.C. 543. It is worth recalling that the events leading to the action and the decision of the House of Lords that there was no remedy aroused public opinion, not about the statute which removed the cause of action, but regarding the observations of certain members of the House of Lords on the Crown practice of "nominated defendants." Those observations were applied and followed by Scott L.J. in *Royster* v. *Cavey* [1947] K.B. 204. As a committee had been set up in 1921 and had reported in 1927 (Cmd. 2842) the first line of defence had been breached.

[16] But see J. F. S. Ross, *Elections and Electors* (London, 1955), for comments on a committee making recommendations about the recommendations of a committee (p. 339).

[17] [1948] 1 K.B. 349.

[18] p. 362. See S. A. de Smith, "Sub-delegation and Circulars," (1949) 12 *Modern Law Review* 37, where the validity of this statement is questioned. But see also J. T. Craig, "Erosion of Reform" (1958) XII *Northern Ireland Legal Quarterly* 234.

an amendment to the Statutory Instruments Act, 1946, might be desirable.[19] A question was later asked in the House of Commons as to the arrangements made for the publication of sub-delegated legislation as the result of the decision in *Blackpool Corporation* v. *Locker*, and the Financial Secretary to the Treasury gave a written reply in the following terms: " So far as Acts passed before 1st January, 1948, are concerned, the publication of sub-delegated legislation is governed by the provisions of the Statutory Instruments Act, 1946, and the Statutory Instruments Regulations, 1948, made thereunder. Under these Regulations such legislation is not precluded from being a statutory instrument or from being published by reason solely of the fact that it is made by virtue of powers conferred not directly by Act of Parliament but by an instrument which is itself made under, or derives from, an Act. So far as sub-delegated legislation under Acts passed after 1st January, 1948, is concerned, the point falls to be dealt with in the enabling Act itself." [20]

This answer further propagates the misconception about the nature of the Statutory Instruments Act fostered by Ministers since the Act was first introduced, sometimes by express assertion but more often by inference.[21] There has been an unfortunate tendency for Ministers to project the Act as *embracing* or catching subordinate rules. This is a gross exaggeration of the scope of the Act. The Act does not *embrace* any kind of rules at all other than those which would have come under the Rules Publication Act, 1893,[22] because every Act passed after the operative date [23] of the Statutory Instruments Act,

19 It is interesting to note that the learned judge, who also presided in *Royster* v. *Cavey* (and, indeed, *Adams* v. *Naylor* (see note 15) was an appeal from a Court of Appeal decision in which he participated), was a member of the Crown Proceedings Committee (Report, Cmd. 2842) and also a member, ultimately the chairman, of the Committee on Ministers' Powers (Report, Cmd. 4060).

20 House of Commons Debates, Fifth Series, 1947–48, Vol. 448, col. 310.

21 *Ibid.* 1945–46, Vol. 415, col. 1095 *et seq.* for the Solicitor-General moving the Second Reading. (See also note 29.) A consequence of this, plus an exaggerated view of the categories of subordinate rules to which the Act could, or would, be applied, is that the term " statutory instrument " has now a connotation far wider than the definition contained in the Act, and is used generally to describe " rules emanating from government departments." For instance, although the Report of the Select Committee on Delegated Legislation (October 27, 1953, p. viii, para. 27) indicates that the Committee confined their attention to " statutory instruments " as defined by the Act, there is an immediate inference that the only subordinate legislation not covered by this is non-ministerial in origin.

22 56 & 57 Vict. c. 66.

23 The Statutory Instruments Act distinguishes between two categories of statutes delegating legislative powers. These categories are (i) statutes which were in operation before the Statutory Instruments Act came into effect on January 1, 1948; and (ii) statutes passed after such date. They are generally referred to as pre-1948 Acts and post-1947 Acts respectively. As a consequence of this the Statutory Instruments Act contains parallel provisions for both categories of enactments. Whereas future Acts (post-1947) require express words to bring down the principal Act, this was inappropriate for Acts already passed and the formula adopted for the earlier Acts was taken from the Rules Publication Act, 1893, which was repealed by the 1946 Act.

namely January 1, 1948,[24] which delegates legislative powers, requires the inclusion of certain words, before rules made under that Act have to satisfy the provisions of the Statutory Instruments Act. Absence of the term " statutory instrument " or " Order-in-Council " in the enabling Act means that the procedure and safeguards of the Statutory Instruments Act do not apply.[25] It is wrong to suggest that the Statutory Instruments Act does more than provide a procedure which may be applied *if the terms of the parent Act so indicate*.[26] And yet the Solicitor-General was able to say in moving the Second Reading: " Generally speaking, from now on all statutory instruments are to be covered by the Bill, and the provisions of the Bill shall apply to all statutory instruments." [27] Apart from what has already been shown, and the fact that before the Act came into operation, regulations made under it excluded certain categories of rules from being " statutory instruments " and excluded certain " statutory instruments " from one of the main provisions of the Act, *viz.* the requirement of publication,[28] an earlier statement which suggested some equation of " statutory instrument " with " rules made by Ministers," *viz.* ". . . a statutory instrument, that is to say, an order made by a Minister," [29] made this general assertion as to the scope of the Act rather misleading.

It is against this background that the Minister's statement on sub-delegated legislation must be examined. In the first place, the question was concerned with the view expressed in *Blackpool Corporation* v. *Locker* that there was no duty on the Minister " either by statute or common law to publish his sub-delegated legislation." The Minister answered this by asserting that there was nothing in the Statutory

[24] The Statutory Instruments Act, 1946 (Commencement) Order, 1947 (S.I. 1948, No. 3).

[25] s. 1 (1). An express provision applying the Statutory Instruments Act can also be effective, of course.

[26] The statute which actually delegates the legislative power is referred to here as the " parent " or " enabling " Act.

[27] House of Commons Debates, Fifth Series, 1945–46, Vol. 415, col. 1101.

[28] See pp. 68–69, *post*.

[29] *Ibid.* col. 1097. It is fair to say that earlier in his speech (col. 1096) the Solicitor-General did give a precise definition of " statutory instrument " in terms of the Act, but in formal terms: " By statutory instruments, I mean all rules, orders, by-laws and Orders in Council, made hereafter under Acts passed hereafter or Acts passed heretofore by Ministers or by His Majesty in Council pursuant to powers conferred by such Acts making such statutory instruments." This is in marked contrast to the informal equation of " statutory instruments " and Ministerial Orders quoted and is also in contradistinction to his statement immediately prior to the definition of " statutory instrument " that he proposed to refer to " Orders made under powers conferred on a Minister " as " statutory instruments because in the Bill that term has been adopted to describe them " (col. 1096). This is just not the case. The Bill did not describe " Orders made under powers conferred on a Minister " as " statutory instruments "; it called " statutory instruments " those subordinate rules, in the case of post-1947 Acts, the enabling Act of which used express terms to denote this and, for pre-1948 Acts, the authority making the rule and the power satisfied the Rules Publication Act, 1893.

Instruments Regulations (made under the Statutory Instruments Act) [30] *precluding* the publication of sub-delegated legislation—a very different matter. To assert that there is no obligation *not* to publish is no answer to a question concerned with the absence of an obligation to publish. In the second place, the Minister, although he emphasised the position under pre-1948 Acts, refrained from indicating that the position regarding sub-delegated legislation was the same as it had been under the Rules Publication Act.[31] And, in the third place, even more important, he did not explain that in relation to post-1947 Acts neither sub-delegated legislation *nor primary delegated legislation* has to meet the requirements of the Statutory Instruments Act, including publishing, unless the parent Act so decrees either by express words or the use of certain terms.[32] If this had been explained, Members of the House might have been more ready on future occasions to ensure that the appropriate terms found their way into statutes delegating legislative powers to the executive.

Although this occurred some two months after the Act came into operation,[33] it gives more cause for alarm than if it had occurred during the passage of the Bill through the House, because, if a Minister will give such an evasive and question-begging answer about the operation of an Act safely on the Statute Book, he is likely to be even less forthcoming at a stage where Parliament could press more effectively for an extension of the scope of the Act.

Illustrations of the same sort of thing, but during the passage of a Bill through the House, are to be found in the legislative history of the Crown Proceedings Act, 1947. Some of the limitations of this Act are well known. For instance, apart from the limitations left untouched by section 1 on the right to sue the Crown for breach of contract,[34] Professor Street has indicated some possible consequences of the restrictive definition of " officer of the Crown " in section 2 (6) in relation to tortious liability, and also the proviso in section 2 (1) which limits actions against the Crown " unless the Act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate." [35] Professor Hanbury has examined the implications of section 28 and

[30] s. 8—considered in more detail at pp. 66 *et seq.*

[31] s. 1 (2) of the 1946 Act.

[32] s. 1 (1).

[33] March 1948. The 1946 Act came into operation on January 1, 1948. The Statutory Instruments Act, 1946 (Commencement), Order (S.I. 1948, No. 3).

[34] *Duncan* v. *The Admiralty*, 1950 S.L.T. (Sh.Ct.) 72 illustrates one of the limitations, at least in Scotland.
See also *Riordan* v. *War Office* [1959] 3 All E.R. 552; [1959] 1 W.L.R. 1046.

[35] Harry Street, " Crown Proceedings Act " (1948) 11 *Modern Law Review* 129. See also G. L. Williams, *Crown Proceedings* (Stevens, London, 1948).

suggests that it may well be that " the position of a litigant whose case may involve the revelation of documents which a Minister wishes to cover with secrecy is precarious indeed. . . ." [36] Both writers refer to the reactionary nature of section 10 which takes away the common law liability of a member of the armed forces who injures another while on duty,[37] and *Adams* v. *War Office* [38] reminds us of the practical distinction between " pension entitlement "—which was professed to make good this restriction of liability—and the award of a pension, just as *Triefus & Co.* v. *Post Office* [39] reminds us of the continuing immunities of the Postmaster-General under section 9, some of which were even extended to " officers of the Crown " by that section.[40]

Yet, in the face of this, the object of the Bill was described in the House of Lords as putting " the Crown, as far as may be, in matters of litigation in the same position as the subject, so that a subject who wants to bring an action against the Crown may proceed as though he were proceeding against another subject." [41] And similar language was used in the House of Commons, for the Attorney-General, in moving the Second Reading of the Bill, was able to say: " But, taking the general law as it exists, as far as may be we place the Crown in the same position as the private citizen, or, to take a perhaps closer analogy, the company or public corporation, is already in regard to it." [42] He also said " But subject to necessary and inevitable distinctions of that kind the broad purpose and effect of this Bill is to enable the citizen to take exactly the same kind of proceedings against the Crown, *and in the same circumstances*, as if the Crown were a fellow citizen." [43]

It is true that there are references in the Attorney-General's statements to exceptions, but it is quite clear from the context that the exceptions referred to are those concerned with the responsibilities of the Crown which do not attach to private individuals or corporations,[44] such as the provision of educational facilities. Even if the

[36] H. G. Hanbury, " Equality and Privilege in English Law " (1952) 68 *Law Quarterly Review* 173 at 178 *et seq.*

[37] *Ibid.* p. 136 and p. 178 respectively.

[38] [1955] 3 All E.R. 245.
And see House of Commons Debates, Fifth Series, 1946–47, Vol. 439, cols. 1683 and 2634.

[39] [1957] 2 Q.B. 352.

[40] " . . . nor shall any officer of the Crown be subject, except at the suit of the Crown, to any civil liability. . . ."
See also Official Reports, Vol. 439, cols. 2612–2633.

[41] By the Lord Chancellor. House of Lords Debates, Fifth Series, 1946–47, Vol. 146, col. 60.

[42] House of Commons Debates, Fifth Series, 1946–47, Vol. 439, col. 1679.

[43] *Ibid.* col. 1679 [italics mine].

[44] *Ibid.* col. 1679, " . . . there are, obviously . . . a number of matters in which an analogy cannot be drawn between the Crown and the private citizen. The private citizen does not have the same kind of responsibility for protecting the

Crown was answerable in the courts as well as Parliament for any failure to fulfil these obligations, protection for the Crown in such circumstances is afforded by section 2 (2) of the Act.

Although it may be arguable that a certain latitude must be allowed a Minister in stating generally the purport of a Bill, it should be remembered that the Attorney-General, in moving the Second Reading, opened his speech with a reference to the difficulties confronting the non-lawyer in understanding the Bill: "This Bill, with its legal jargon, its technical provisions and its procedural details, is more likely to arouse the enthusiasm of the lawyer than the layman. Indeed the occasion of its passage through the House must provide something in the nature of a lawyer's holiday." [45] Under the circumstances it would seem that there might well have been a duty on the Attorney-General to exercise meticulous care lest the non-lawyers—and perhaps the lawyers as well—gained the impression that the Act went further than it did.

Although it is clear from the instances already given [46] that the Act falls far short, in many ways, of the ministerial pronouncements to Parliament of its purpose and effect, this analysis will be confined to section 2, which the Attorney-General seemed to think was the most important clause in the Bill,[47] and which is concerned with the liability of the Crown in tort.

It is an undoubted rule of law that the Crown is not bound by an Act of Parliament unless there can be gathered from it an intention that the Crown should be so bound, or, as it is more usually expressed, statutes bind the Crown only by express words or necessary implication. Of course, the right to sue is meaningless unless there is a breach of duty, and for the Crown to be in breach of a *statutory* duty it must first of all be bound by the statute creating the duty. The availability of a procedural right against the Crown scarcely affects the Crown's privilege if it is relieved of the duties imposed on others, and, consequently, the effect of statutes on the Crown is a fundamental of the scope and operation of the Crown Proceedings Act. Now, although some doubt has been expressed in relation to certain types of statute,[48] there is weighty evidence that the presumption that

public, such as the Crown possesses; he does not have the care of the public safety; he does not have the defence of the realm to consider; he is not responsible for the organisation of such great services as the Post Office."

The general tenor of such explanations suggests that the references to exceptions to the general analogy between the Crown and a private citizen or a public corporation are limited to duties unique to the Crown and infers that there are no exceptions of any other kind.

45 *Ibid.* col. 1675.

46 See p. 54, *ante*.

47 *Ibid.* col. 1680.

48 G. H. Treitel, "Crown Proceedings: Some Recent Developments," [1957] *Public Law* 321. But see also Glanville Williams, *op. cit.* pp. 55–57.

the Crown is not bound by Acts of Parliament remains unimpaired by the Crown Proceedings Act. Section 40 (2) provides (*inter alia*): "Except as therein otherwise expressly provided, nothing in this Act shall: (*f*) affect any rules of evidence or any presumption relating to the extent to which the Crown is bound by an Act of Parliament." There are also particular statutes, of an earlier date than the Crown Proceedings Act and which contain no provision binding the Crown, that are named in the Crown Proceedings Act and declared to be binding on the Crown.[49] This is consistent with the presumption being unaffected, for it might have been expected that if the presumption had been altered or weakened the Act would have made provisions for exceptions to the new presumption which would have taken the form of specified Acts declared to be *not* binding on the Crown. Section 31 (1) gives the Crown the advantage of an Act of Parliament although not named therein, and this, too, seems unnecessary unless against the background of a presumption that the Crown is not bound by statutes.

In addition to this, when an amendment was proposed at the committee stage of the Bill to insert the words " or under any statute " after the words " at common law " in section 2 (1) (*b*), the Attorney-General, in indicating his opposition to the proposal, said: " If Subsection (1) (*b*) were to include this reference to any Statute, it would, of course, have the effect of imposing on the Crown an obligation to comply with Statutes, which, when they were passed by Parliament, were intentionally made not binding on the Crown. It is not the intention of this Bill to alter the existing substantive law in regard to matters of that kind. In regard to the question of which Statutes should bind the Crown and which should not, it is a matter for Parliament to deal with in the case of each particular Statute it passes. Parliament has sometimes thought it proper that the Crown should be bound by the statutory duties being created; in other cases it has thought not. It is for Parliament to say, in relation to each Statute, whether it is to bind the Crown or not, and it would create the greatest possible confusion to endeavour now to bind the Crown by every Statute without first examining whether it was really appropriate that the Crown should be bound by it or not." [50]

The claim that Parliament would somehow or other inhibit itself

[49] *e.g.*, Law Reform (Contributory Negligence) Act, 1945, is declared binding on the Crown—s. 4 (3).

[50] House of Commons Debates, Fifth Series, 1946–47, Vol. 439, col. 2611.
Even if the effect of the additional words was as suggested, which is very doubtful, the Act could have named the statutes that were to be excepted, just as it did in fact name earlier enactments that were to be binding on the Crown; and future Acts could have contained an express provision relieving the Crown. But this is perhaps a little more difficult administratively and certainly inexpedient from the executive point of view.

from determining whether or not a particular statute should bind the Crown is nonsense. Parliament is supreme and if it considers an Act should not bind the Crown it can say so whether the words " or under any Statute " appear in section 2 (1) (*b*) or not.[51] Parliament is not confined to relieving the Crown from a statutory obligation by an act of omission; this can equally be done by express statement, although it is to the advantage of the executive to manoeuvre Parliament into a position in which relief for the Crown can be obtained by the silence of an Act rather than by express provision.

Thus, on the evidence, it seems reasonable to take the view that the operation of the sections of the Crown Proceedings Act dealing with the liability of the Crown in tort is substantially determined by the presence or absence of certain provisions in other Acts of Parliament, namely, provisions directly or indirectly binding the Crown. And any claim that the Crown Proceedings Act substantially eliminates Crown privilege, or any suggestion that the position of the Crown can be identified with that of an individual, company or corporation must be qualified by the fact that the operation of the Act can be nullified, and therefore the limits of its scope determined, by *something that is omitted* from other statutes whether prior or subsequent to the Crown Proceedings Act.[52] And this was indisputably the intention of the Government—as opposed to the intention of Parliament—for the Attorney-General's argument when he resisted the amendment to include statutory duties [53] clearly contains the *implication* of such a limitation in scope. Yet the Act was held out to " place the Crown in the same position as the private citizen, or, to take a closer analogy, the company or public corporation. . . ." [54]

But this position need not only be set alongside general expressions of the purport of the Bill. The particular statements regarding section 2 are equally illuminating since they enjoy even less coincidence with

51 Treitel *op. cit.* goes on to suggest an enactment providing that, " in the absence of express legislative provision to the contrary, all existing and future statutes reforming the law of torts should bind the Crown." This suggestion has merits other than its simplicity but there is little likelihood of it being readily adopted because of the advantage to the executive of the existing provisions (p. 326).

52 Professor Street also suggests that the retention of the presumption seems unjustified, particularly in view of advantage of the Crown in s. 31 (1), and he reminds us of the particularly wide interpretation of the presumption in favour of the Crown in *Cooper* v. *Hawkins* [1904] 2 K.B. 164.

Glanville Williams criticises the presumption at greater length *op. cit.* p. 54. It is interesting to note that the presumption now has statutory authority in Northern Ireland. The Interpretation Act (Northern Ireland), 1954, s. 7, provides that express words are required to bind the Crown, *i.e.*, the " transferred Crown," in any subsequent enactments of the Parliament of Northern Ireland.

See W. A. Leitch and A. G. Donaldson, " A Commentary on the Interpretation Act (Northern Ireland), 1954," (1954) XI *Northern Ireland Legal Quarterly* 45 at 72.

53 See p. 57, *ante*.

54 See p. 55, *ante*.

the formal terms of that section. The first two subsections of section 2 are in the following terms:

> 2.—(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:
>
> (*a*) in respect of torts committed by its servants or agents;
>
> (*b*) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
>
> (*c*) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph (*a*) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.
>
> (2) Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.

Now these two subsections fundamentally determine the extent to which the Crown *may* be liable in tort,[55] and the Attorney-General, during his speech on the Second Reading, indicated the scope and effect of section 2: " Clause 2—which, I suppose is the most important Clause in the Bill—makes the Crown liable in tort, and so far as practicable the Crown, in its public capacity, will be subject to the same liabilities for wrongs committed by its servants or agents as a private citizen or a public corporation. The Crown will be responsible in the ordinary courts and in the ordinary ways for negligence, for any wrongful acts or defaults by its servants and agents, for breaches of the common law or statutory duties—for instance under the Factory Acts—it owes to those whom it employs, and for breaches of duty which arise from the occupation of premises or land." [56]

The scope of the reform to be brought about by section 2 would

[55] Bearing in mind subs. (6) which contains a fairly narrow definition of " officer of the Crown " for the purpose of proceedings against the Crown.

[56] House of Commons Debates, Fifth Series, 1946–47, Vol. 439, col. 1680. In view of the express statement that clause 2 " makes the Crown liable in tort " it is interesting to note Glanville Williams' assertion: " There is no section of the Act stating generally that the Crown shall be liable in tort. Instead, the general principle [' the King can do no wrong '] is left, but very wide exceptions are carved out of it." *Op. cit.* p. 28.

appear to be considerably more limited than the Attorney-General's pronouncement would suggest, and the statement is worthy of close examination for the subtleties of construction and the peculiarities of logic that it displays. The analogy employed at the beginning of the statement—a reiteration of earlier assertions as to the purpose and effect of the Bill—helps to convey an exaggerated impression of the scope of the Act; and this is reinforced and given concrete expression by the claim that, ". . . so far as practicable the Crown, in its public capacity, *will be subject to the same liabilities for wrongs* committed by its servants or agents as a private citizen or a public corporation." Although this specific claim does not have the vague covering qualification of the kind sometimes attached to the use of the general analogy of Crown and private liability, such as " taking the general law as it is "—a qualification implying much to the lawyer well informed on the Crown's legal position under Acts of Parliament, but correspondingly little to the not-so-well informed—it does not misrepresent the effect of section 2, *provided that*: (i) it is realised that " will be subject to the *same* liabilities for wrongs " *does not mean for the same wrongs*; (ii) it is appreciated that " Crown wrongs " are very different from, and of a much more limited class than, " wrongs committed by a private citizen, company or public corporation "; and (iii) it is understood that the Crown Proceedings Act only affects this distinction in relation to defined classes of common law duties [57] and neither inhibits the Crown from perpetuating the distinction between " Crown wrongs " and other wrongs, nor from enlarging the disparity between the two.

In addition to this, the statement makes reference to the Crown's liability for breach of statutory duties, the ". . . Crown will be responsible . . . for breaches of the common law *or statutory duties* . . . ," without any qualification as to the essential requirements in *other* Acts of Parliament to give this any meaning: yet the presumption that the Crown is not bound by Acts of Parliament and the opening words of section 2 (2), " Where the Crown is bound by a statutory duty . . . ," surely necessitate some qualification, since the Crown Proceedings Act does not make the Crown " responsible . . . for breaches of . . . statutory duties " *unless* the statute creating the duty binds the Crown. Not only was this not made clear to the House but the context of the claim seems unnecessarily misleading. The whole statement about the scope and effect of section 2 comprises an analogic assertion couched in general terms, then a less general statement about Crown liability for negligence, and, finally, three

[57] The categories are not necessarily comprehensive. In any case they tend to suffer diminution elsewhere in the Act, *e.g.*, s. 10 (1) reduces, however legitimately, the generality of paragraph (*b*).

specific claims, the first related to paragraph (*a*) of section 2 (1), the second to paragraph (*b*) and the third to paragraph (*c*). The only reference to statutory duties is that contained in the second of these three claims, *i.e.*, duties the Crown "owes to those whom it employs," but the interpolation of an example, namely, the "Factory Acts"—an example that is in itself highly suspect [58]—tends to connect the assertion about liability "for breaches . . . of statutory duties . . ." to the more general and comprehensive claims that dominate the earlier part of the statement rather than to the part immediately after the interpolation, *viz.* ". . . it owes to those whom it employs." And, even with this restrictive qualification, the implications of the claim are highly dubious, for it is far from certain that the Crown is bound by every statutory provision that places obligations on employers regarding those they employ. And the Attorney-General, on a subsequent occasion when pressed about the desirability of the Crown being a "model employer" said: "It is not easy to see what Statutes might affect the position as between master and servant other than the Factories Act. That is, at all events, the major Act which gives rise to claims on behalf of injured workmen. There are other Statutes which affect the position of servants. . . ." [59] The Attorney-General did not indicate whether or not the "other Statutes" also bound the Crown. In any case, paragraphs (*b*) and (*c*) are so similar in concept and form that to imply that the limitation to common law duties in the former is somehow or other overcome elsewhere in the Act is to imply the same about the latter, and this implication is strengthened by subsequent use of the word "duty" without any qualification in terms of the common law and statutory duties dichotomy, *viz.* ". . . for breaches of duty which arise from the occupation of premises or land."

There is much in all this to support the view that the fortunate coincidence that one Act of Parliament which binds the Crown also, according to the Attorney-General, accounts for nearly all of the statutory duties correlative with the common law duties described in paragraph (*b*), permitted an assertion to be made about statutory duties that could very easily obscure the very severe limitations of the Act. The Factories Act, 1937,[60]—presumably this consolidating enactment was intended by the reference to the "Factory Acts"—is a single instance given to support a general proposition. Moreover, it contains a unique element in that it contains express terms applying its provisions to ". . . factories belonging to or in the occupation of the

[58] See this page.
[59] House of Commons Debates, Fifth Series, 1946–47, Vol. 439, col. 2611.
[60] 1 Edw. 8 & 1 Geo. 6, c. 67.

Crown," [61] and, as the Attorney-General, in a slightly different context, pointed out, this is not the general rule: "Parliament has sometimes thought it proper that the Crown should be bound by the statutory duties being created; in other cases it has thought not." [62] And the unfortunate use of the term "Factory Acts" instead of "Factories Act" suggests a plurality of instances that did not in fact exist.

There is perhaps no great difficulty in all this for the lawyer conscious of the dichotomy of common law and statutory duties, and aware of the significance of the categories of tort-situations set forth by section 2, but our legislators are not all lawyers skilled in such classifications—and the Attorney-General expressed his awareness of this when he opened the debate by referring to the difficulties of the non-lawyer in understanding the Bill.[63] It is difficult to appreciate why there was no clear exposition of the distinction between common law and statutory duties and the House made aware that in relation to the latter the scope and effect of the Crown Proceedings Act would depend on the presence of provisions binding the Crown in existing Acts of Parliament and the willingness to include such provisions in future ones. It is not unreasonable to assume that the House failed to appreciate the special and rather fortuitous circumstances that permitted the Attorney-General to make the claim he did about Crown liability and statutory duties, and neither realised the very limited and qualified extent of this nor the potential created for future reduction of the effects of the Act by the simple device of omitting provisions binding the Crown from future enactments. The failure to inform Parliament of the important distinction betwen common law duties and statutory duties and its relevance for the Crown Proceedings Act precluded Parliament from expressing any

[61] s. 150 (1). "This Act applies to factories belonging to or in the occupation of the Crown and to building operations and works of engineering construction undertaken by or on behalf of the Crown; but in case of any public emergency the Secretary of State may, by order, to the extent and during the period named in the order, exempt from this Act any factory belonging to the Crown or any building operations or works of engineering construction undertaken by or on behalf of the Crown, or any factory in respect of work which is being done on behalf of the Crown."

It must be remembered, of course, that the Factories Act provides for penalties and criminal proceedings, and not all of the duties affect civil liability. See, for instance, *Groves* v. *Wimborne* (*Lord*) [1898] 2 Q.B. 402 and *Biddle* v. *Truvox Engineering Co.* (*Greenwood & Batley, Third Party*) [1952] 1 K.B. 101. *Cutler* v. *Wandsworth Stadium* [1949] A.C. 398 is also of interest here, although it is concerned with a statute other than the Factories Act. For an interesting discussion on statutes binding the Crown and the criminal liability of the Crown see W. Friedmann, "Public Welfare Offences, Statutory Duties, and Legal Status of the Crown" (1950) 13 *Modern Law Review* 24.

Another point of interest is that a fairly recent decision, *Nottingham No. 1 Area Hospital Management Committee* v. *Owen* [1958] 1 Q.B. 50 ought to serve as a useful reminder about the not insubstantial effects of the terminology employed in statutory references to the Crown.

[62] House of Commons Debates, Fifth Series, 1946–47, Vol. 439, col. 2611.

[63] See p. 57, *ante*.

real intention regarding the scope of the proposed Act, for the issues were never fairly and squarely put before either the House of Commons or the House of Lords. Not only was there obscurity surrounding the effects of the Bill on the presumption that the Crown is not bound by Acts of Parliament, but there was never any reason given why the words " at common law " had to be included in paragraphs (*b*) and (*c*) of section 2 (1).[64] Therefore, although Parliament approved the measure of reform, and consequently its limitations, by formally approving the terms of the Bill, it is without reality to express this as the " intention of Parliament," for it never faced the issues because it was never confronted with them.

Formulae and Concepts

One underlying reason for much of the disparity between Government assertions of the scope of reforms and judicial interpretation of the formal terms of the enactment, and a reason for the evasiveness of Ministers in dealing with certain questions or amendments, is to be found in the use—and perhaps also in the concealment of its usefulness—of a particular formula employed extensively in our legislation, particularly where the freedom of action of the executive is involved. And both the Crown Proceedings Act and the Statutory Instruments Act are illustrations of it. The formula is that which requires express words in each and every subsequent statute to apply some limitation already expressed in some major reform statute and appearing to be of general application. It is always easier to relieve oneself of an obligation by an act of omission than by an act of commission. And the British executive, skilled in the use of this formula, enjoys its benefits to the fullest, particularly in relation to its own discretionary powers and privileges. This formula employed in the Crown Proceedings Act means that in relation to statutory duties a failure to bind the Crown leaves the Crown, for the purposes of the particular statute, in the same privileged position it enjoyed before the passing of the Crown Proceedings Act.[65] Such an act of omission is much less likely to arouse Parliament than the proposed inclusion of a clause exempting the Crown or excluding the operation of the Crown

64 It is true that at the Committee stage the Attorney-General, in rejecting an amendment to add the words " or under any statute " to paragraph (*b*), indicated that this would have the effect of making statutes bind the Crown. See p. 57. This, of course, even if correct, does not explain why, in such circumstances, a statute could not contain a provision expressly relieving the Crown.

65 It is interesting to note that it appears to have been necessary in the Occupiers' Liability Act, 1957 (5 & 6 Eliz. 2, c. 31), to include a provision applying the Crown Proceedings Act *as well as* a provision binding the Crown (s. 6). It could be argued that on a particular interpretation of s. 2 of the Crown Proceedings Act the absence of *either* provision in certain kinds of statutes would relieve the Crown.

Proceedings Act.[66] And so, in addition to the limiting effect of pre-existing statutes devoid of the necessary provisions, over a period of years the reform so hardly won can be whittled away by such omissions from subsequent statutes, and the executive regain much of the ground lost when the reform measure first came into operation.

And it is the same with the Statutory Instruments Act, 1946. This was a measure to regulate and control the exercise of legislative powers enjoyed by the executive and, for this purpose, the Act provides for a uniform nomenclature,[67] a relatively uniform concept of "laying before Parliament," [68] and a system of publishing subordinate rules [69] which is backed by a mild sanction for a failure to publish.[70] This is a comprehensive measure, the value of which depends on its operating comprehensively. But here again, at least in relation to subordinate legislation made under post-1947 Acts—presumably, with the passage of time, the more important category than the pre-1948 Acts [71]—express words are required in each and every statute before the Act operates on the exercise of the relevant rule-making power.[72] Simple omission in the statute delegating the legislative power frees the subordinate rules from being "statutory instruments" and having to satisfy the requirements of the Act, including printing and issue.[73] This was the issue confronting the Financial Secretary to the Treasury when he was asked about the position of sub-delegated legislation.[74]

66 In a recent B.B.C. transmission when a Minister was asked if he thought the House of Commons had fully appreciated the consequences of a particular measure, he replied that it had all been before the House, and when pressed to answer if he thought Parliament had been aware of a particular consequence, he replied that this would be to over-estimate the intelligence of Parliament.

67 s. 1.

68 ss. 4–7. Some further technical points regarding "laying before" were cleared up by the Laying of Documents before Parliament (Interpretation) Act, 1948, but a number of problems still remain.

69 s. 2.

70 s. 3 (2).

71 The Act differentiates between statutes passed before, and statutes passed after, the commencement of the Statutory Instruments Act, pre-1948 and post-1947 Acts respectively, the two categories having to satisfy different provisions before the Statutory Instruments Act will operate. Although there are still many legislative powers delegated by pre-1948 Acts these must inevitably diminish in importance in relation to powers under post-1947 Acts.

72 s. 1 (1)—Order-in-Council or "exercisable by statutory instrument," or, of course, an express provision that the Act is to apply. But, by s. 2 (2), pre-1947 Acts have to satisfy a criterion originally laid down by the Rules Publication Act, 1893.

73 See, for instance, s. 5 (2) of the Reserve and Auxiliary Forces Training Act, 1951, which provides for regulations governing pay and allowances as well as discipline; but regulations under s. 4 (3) are "statutory instruments."

It must be said, however, that there are far more instances of enabling provisions applying the Act than not, and it seems to be more usual now to employ one general provision applying the Act rather than the necessity of a reference in each enabling provision: however, there is an absence of any such provisions in amending and consolidating enactments, which could, under certain circumstances, exercise a considerable effect. See, for instance, s. 10 of the Civil Aviation Act, 1949—the regulations certainly do not have to lie before Parliament, *e.g.*, S.I. 1954, No. 925.

74 See p. 52, *ante*.

Sub-delegated legislation is *neither embraced nor excluded* by the Statutory Instruments Regulations—nor by the Act. And, in this sense, it does not differ from primary delegated legislation which is likewise neither embraced nor excluded. Both can equally be caught by the Statutory Instruments Act and the Regulations thereunder, but *only* by positive action in the statute delegating the legislative powers,[75] and the absence of such positive action frees the subordinate rules, whether primary or one or several stages removed from the enabling statute, from the necessity of compliance with the provisions of the Statutory Instruments Act. This Act does provide a comprehensive—and valuable—procedural control over the exercise of delegated legislative power, but the authority *for each and every* application of this control must be found, not in the Act itself, but in each enactment which delegates legislative power.

And so one is tempted to cast a doubtful eye on comprehensive measures for controlling the exercise of executive power if, in the last resort, positive legislative action is necessary in every case to apply the control. Parliament is supreme and it is open to it, without such comprehensive measures being on the Statute Book, to insert controls in any Act of Parliament which grants a power requiring control. A comprehensive control which equally requires an exercise of parliamentary sovereignty in every instance in which the control is to be applied is of doubtful value unless Parliament is acutely aware of this or the Minister sees it as his duty to draw attention to it. Otherwise, it is little more than a complex which can be applied by a simple symbol—a draftsman's device—and, furthermore, tends to create the impression that there is no need to advocate control measures in an Act delegating powers because a comprehensive control is already in existence.[76] Such enactments cannot do much more than this so long as those who have the power to initiate legislation have such a convenient device to hand and, unfortunately in one sense, the experience and traditions of our administrators prevent blatant abuse of such good fortune, the device being reserved for the most important occasions, thus diminishing the chances of creating " circumstances which would expedite a change " and thereby keeping the weapon loaded and in good repair, if not at the ready.

[75] See Motor Vehicles (International Circulation) Act, 1952. S. 1 (1) delegates a legislative power the legislative products of which are, by this subsection, Orders-in-Council: they are therefore " statutory instruments." S. 1 (3) authorises the delegation of a legislative power to the Minister of Transport by such Orders-in-Council, but there is an express provision in the subsection that the Statutory Instruments Act will apply to regulations made by the Minister of Transport under such delegated powers. Therefore, this sub-delegated legislation is caught by the definition of a " statutory instruments " and the Act will apply.

[76] It would appear, particularly from the rather loose use of the term " statutory instrument," that the existence of the Statutory Instruments Act has stilled much of the disquiet about the exercise of legislative powers by the executive.

It may be argued that there are justifiable instances of such controls not being applied by a particular Act. This may be so, and there may well be a real need for such flexibility, but both of these requirements could be equally well satisfied, although more honestly and openly, by applying the control in all instances by the controlling Act and then making specific provision for any particular exception in the relevant enabling Act. Parliamentary sovereignty need not be exercised only by silence.

Further Discretionary Powers

It should not be assumed that relief by simple omission is the only way by which the executive advances its own cause. Evasion by silence may be expedient, uncomplicated and unlikely to arouse resistance, but unvarying and persistent use of this device can invite political hazards in that the probability of provoking parliamentary opposition may increase with the number of occasions on which it is employed and, furthermore, sustained resistance to one instance may well illuminate the other instances and may even engender a more wary parliamentary attitude on future occasions. The executive invites no such calamity. When variety is required or desired the simplicity of silence can be replaced by complexity of concept, and this has the additional merit of *appearing* to apply the controlling measure without actually applying it, or applying it but discreetly emasculating it. And this may be done by subordinate rules.

The passing of the Statutory Instruments Act brought into use a new term, "statutory instrument," which, unfortunately, and by ministerial encouragement, is often regarded as synonymous with "subordinate rules emanating from government departments." [77] Apart from the falsity of this view of the scope of the Act, and also apart from the post-1947 Acts which, by omitting to apply the 1946 Act,[78] put subordinate rules made under such Acts outside the definition of the term "statutory instrument," there are many instances of statutes which delegate a legislative power to the executive in terms which bring the Statutory Instruments Act into operation but the legislative products are not necessarily "statutory instruments," or are exempt from one of the most important provisions of the Statutory Instruments Act, namely, the condition of publication and sale. And this is accomplished by the exercise of a discretion granted by the Statutory Instruments Act, *i.e.*, the legislative power delegated to the Treasury [79] by section 8, which has manifested itself in the Statutory Instruments Regulations.

[77] See pp. 52–53, *ante*.
[78] See example in note 73.
[79] With the concurrence of the Lord Chancellor and the Speaker of the House of Commons.

Regulations made under section 8 exclude from the category of "statutory instrument," and therefore from the provisions of the Statutory Instruments Act, rules that are executive in character (as opposed to legislative in character),[80] rules legislative in character but which apply to named persons or premises and which are not required to be laid before the House of Commons,[81] and certain confirmations,[82] including some Orders-in-Council. In addition to this, certain enactments are specified in a Schedule to the Statutory Instruments Regulations and it is provided that rules made under such powers are not "statutory instruments."[83] Although these categories are restricted by the delegated power and by the Regulations to the exercise of powers under pre-1948 statutes—consequently strengthening the argument that there was little to prevent these exclusions from being embodied in the text of the Act[84]—the last-named category has been extended to certain post-1947 Acts by those Acts themselves. For instance, the Army Reserve Act, 1950, contains the provision that: "For the purposes of the Statutory Instruments Act, 1946, this Act *shall be deemed to be an Act passed before the commencement of that Act*, and any reference in regulations made under . . . that Act to any provisions of the Reserve Forces Act, 1882, shall . . . be construed as a reference to the corresponding provision of this Act."[85] The section of the 1882 Act which delegates legislative power, section 20 (2), is named in the Schedule to the Statutory Instruments Regulations, and it follows that the corresponding section of the 1950 Act, section 27 (2), must be deemed also to be specified, with the result that rules made under this section are not "statutory instruments" and so do not attract the provisions of the 1946 Act.[86]

This exercise in sovereignty defeats the clear intention of section 8 (1) (*d*), Statutory Instruments Act and, although legitimate in terms of law and our constitutional practice, it is open to criticism. The implications of the words, "deemed to be an Act passed before the commencement of that Act," are hardly susceptible to immediate comprehension by persons not familiar in great detail, not only with

80 Reg. 2 (1) (*a*). Griffith and Street suggest (*Principles of Administrative Law*, p. 51) that instead of this distinction being the determinant regarding publication the question of publication is first decided and, as a result of that determination, the rule is classified "legislative" or "executive." If this is so, an executive decision whether to publish determines whether a rule is, or is not, a "statutory instrument."

81 Reg. 2 (3) (*a*).

82 Reg. 2 (3) (*b*). See also S.I. 1948 No. 2.

83 Reg. 2 (3) (*c*).

84 Similar rules were in operation under the Rules Publication Act, s. 3 (4), and this also strengthens the argument that after so many years' experience the rules could have been embodied in the 1946 Act. The existence of such rules also suggests that Parliament ought to have been aware of at least some of the uses to which the powers given by s. 8 would be put.

85 14 Geo. 6, c. 32, s. 27 (4). S. 26 (4), Air Force Reserve Act, 1950, is similar.

86 Regs. 4 & 5.

the Statutory Instruments Act, but also with the Regulations made thereunder—and it is perhaps unreasonable to assume Members of the House to be so familiar. This complicated device, involving a rather complex legal notion, to extend the scope of a regulation whose substance and effect—even perhaps its existence—are unlikely to be known in detail to the House raises grave suspicions when the same objective could have been achieved by simple omission of any reference to "statutory instruments" or the Statutory Instruments Act—a procedure that the executive has been not unwilling to employ elsewhere.[87] And to those not completely familiar with the content and implications of the Statutory Instruments Regulations, the reference to the Statutory Instruments Act, particularly to those aware of the consequences of the omission of any reference to "statutory instruments" in an enactment delegating legislative power, may well be even more misleading.

The Statutory Instruments Regulations also exempt certain classes of "statutory instruments"—whether made under pre-1948 or post-1947 Acts—from one of the most important provisions of the Act, namely, printing and sale. The Regulations distinguish between instruments that are local and general in nature.[88] Those certified as local by the "responsible authority," *i.e.*, the Minister who made the instrument, need not be printed or put on sale.[89] In addition, certain instruments of a general character are also exempt from the requirement of printing and sale if they are otherwise regularly published or if they are short-lived and publicised elsewhere.[90] Schedules to instruments, if they are bulky and are available or publicised elsewhere, need not be printed and put on sale, and, the final refuge, printing and sale is not required if that is contrary to the public interest.[91]

All this has been brought about by the exercise of a legislative power by the executive, granted by the Act which was introduced as a means of controlling the exercise of legislative power by the executive. Thus, several of the major merits of that Act have been substantially modified by the action of the executive. Apart from the fundamental nature of the requirement of publishing the rules governing society, the uniformity of nomenclature and procedure so

87 Example at note 73. See also the rather interesting example in the Land Powers (Defence) Act, 1958, s. 7 and s. 24.

88 Reg. 5 (*b*).

89 Reg. 6.

90 Reg. 7. In *R.* v. *Sheer Metalcraft, Ltd.* [1954] 1 All E.R. 542, "available or publicised elsewhere" seemed to be satisfied by publication of the maximum permitted prices in the *Board of Trade Journal* and two trade papers.

91 Reg. 8. Sir Carleton Allen, "Statutory Instruments Today" (1955) 71 *Law Quarterly Review* 490 at p. 500, says that this appears to be an uncontrolled discretion.

urgently and amply requested by the Donoughmore-Scott Committee and so loudly proclaimed as a major feature of the 1946 Act is now, to say the least, a highly misleading assumption. There are rules which appear to be " statutory instruments " because the enabling Act brings the Statutory Instruments Act into operation but the rules themselves are excluded from being " statutory instruments " by virtue of the Statutory Instruments Regulations, and so the provisions, procedures and safeguards of the Statutory Instruments Act become inoperative; and there are rules which are " statutory instruments " but which, by the Statutory Instruments Regulations, are not required to conform to one of the most important provisions of the Act.[92] And there are rules published as statutory instruments and so designated with an appropriate reference number but which *need* not have met the provisions of the Statutory Instruments Act.

That exclusions and exemptions are necessary may be a vital point, but, even accepting this, there may be debate as to the scope and substance of such exceptions, and it remains indisputable that the responsibility for such a determination and delimitation is one that should be borne by Parliament. The importance of such matters merits a place in the text of the Act, not promulgation by decree. The interest of the executive in this makes it a serious matter that Parliament should delegate such a power under such circumstances, and it is even more serious and unworthy that the executive should seek and accept such a power.

Nor is this the end of the matter. It is clear that, as soon as categories of exemptions and exclusions are created, some adjudicative function becomes necessary. The determination of the category of a particular rule implies some kind of machinery for this purpose, and suggests the necessity of safeguards to prevent abuse of the categories of exemption and exclusion. But this too is taken care of by the Regulations. The Act makes provision for " a person or persons nominated by the Lord Chancellor and the Speaker of the House of Commons " to determine questions relating to the class of a statutory rule and the class or description of a " statutory instrument " [93]— referred to in the Regulations as the Reference Committee.[94] Apart

[92] *i.e.*, publishing (see p. 68, *ante*).

There have been yet other kinds of " statutory instruments " created by certain enabling statutes. For instance, Post Office Savings Bank Act, 1954, s. 9 (4), and Trustee Savings Bank Act, 1954, s. 76 (4), provide for " statutory instruments " to which s. 6 of the Statutory Instruments Act does not apply. Another variety is created by Diplomatic Privileges (Extension) Act, 1950, s. 2, although it is fair to say that a more onerous procedure is substituted.

All this is quite apart from the number of statutory instruments which do not have to lie before Parliament because the enabling Act is silent on this—and also quite apart from the ones that have to lie before Parliament but with no provision as to which procedure is to apply.

[93] s. 8 (1) (*e*).

[94] Reg. 11.

from the fact that the rules the Committee has to apply are also contained in the Regulations [95]—and not in the Act—this Committee seems substantially to enjoy only a supervisory function, and a limited one at that. The power of interpreting the Regulations and so determining whether a particular rule is or is not a " statutory instrument " and, if it is such, whether or not it is exempt from the condition of printing and sale according to the Regulations is, by the Regulations, given to the " responsible authority," a concept not anywhere referred to in the Act. The " responsible authority " is defined in the Regulations as " the Minister by whom the instrument is made." [96] It is true that the Reference Committee can override the " responsible authority " but, in practice, and in relation to certain Regulations, it would appear *only if it is consulted*.[97] And section 8 (1) of the Act does not appear to envisage this situation. It is difficult to resist the conclusion that one discretion has been substituted for another—and the absence of evidence of blatant abuse of the substituted discretion neither proves that there is no problem nor provides an answer to it.[98]

Conclusion

Perhaps the analysis provides firm ground for the conclusion that the concept of separation of powers still has virtue and is disregarded at peril. As a reminder—if that is necessary—that the executive not only legislates but also adjudicates, it is worthless, and as an inspiration that this ought not to be so, it is outmoded; but as a conceptual notion which directs attention towards, and illuminates, any aspect of the nature of existing executive power, it has merit. If the doctrine helps towards an understanding of the real nature of certain discretionary powers of a necessarily powerful executive and of the difficulties of controlling their exercise, and towards an appreciation of the danger that the substitution of one discretion for another can easily pass as a form of control, it deserves more respect

[95] *e.g.*, Reg. 2.

[96] Reg. 1 (2) (*b*).

[97] Reg. 11 (3) permits the Reference Committee to dispense with notification.

[98] Even at that there has been strange conduct in the Ministry of Supply—see *Defiant Cycle Co.* v. *Newell* [1953] 2 All E.R. 38. Neither the Reference Committee nor the " responsible authority " prevented a letter from an assistant secretary stating that a schedule was exempt from printing and sale from being accepted—except by the court—as a certificate of exemption under Reg. 7. But although the court decided that there was no certificate under Reg. 7 this did not affect the *validity* of the instrument.

And there has been the Price Control and Other Orders (Indemnity) Act, 1951, in respect of irregularities in the laying before Parliament of schedules and documents of some 160 orders made by the Board of Trade and some 23 by the Ministry of Supply (including the schedule referred to in the case above which, it appears, was neither laid before Parliament nor printed and put on sale).

The indemnity granted by this Act can be extended by surbordinate rule.

than has hitherto been accorded to it in British constitutional theory and practice, at least in modern times. While accepting the need for a powerful executive enjoying considerable discretionary powers in order to ensure the flexibility considered so essential in modern conditions, there would seem to be no justification for the executive enjoying the right to fashion the controls over the exercise of such powers and to be in a position to determine if and when the controls are to be applied. An awareness of this problem is an essential condition of any remedy, and the doctrine of separation of powers seems to have a usefulness as a concept in creating this awareness.

This analysis has been confined to two Acts of Parliament. It is not suggested that these two statutes establish general propositions regarding executive power. The general propositions, *i.e.*, the near-monopoly of the executive in initiating legislation and its consequent control over formulae and concepts embodied in the Bills introduced, are propositions self-evident in the British constitution. If they require proof it is not to be found in an analysis of two Acts of Parliament. But the two enactments considered in this analysis provide concrete instances of the implications of these general propositions, and they are particularly useful vehicles because the problems and difficulties arising from these features of the British constitution are most acute, and can be most dramatically illustrated, when the executive is faced with a demand to control its own powers and privileges. And the two statutes are characteristic of this situation. But this does not imply a limit to the various manifestations of this kind of problem. The difficulties exist—admittedly in a much less acute and perhaps rather less important form—in relation to other types of legislation. For instance, there are certain problems associated with the notion of *mens rea* in statutory offences, and the language of Acts of Parliament, *e.g.*, knowingly, wilfully, suffering, permitting, causing, has added to the burden of the courts in determining the intention of Parliament.[99] If the executive, with its apparent absence of any reluctance to add to the long list of statutory offences, chooses to be complicated, vague, obscure or ambiguous regarding one element of an offence in order to keep parliamentary concern dormant and to minimise parliamentary resistance, it is not surprising that the "intention of Parliament" becomes an abstraction of infinite difficulty.[1] In short, if the executive

[99] Sir Patrick Devlin, "Statutory Offences" (1958), IV *Journal of the Society of Public Teachers of Law* 206. Also J. Ll. J. Edwards, *Mens Rea in Statutory Offences* (London 1955).

[1] *Ibid.* p. 246. "The question is whether at the present day sufficient, if indeed any, attention is given by Parliament to the problem whether, in laying down prescribed standards of conduct in the fields of public health . . . etc. . . . , it is necessary that the fundamental maxim of criminal liability should be ignored or thrown overboard. How often, for instance, is this question considered by

does not present the issue fairly and squarely to Parliament it follows that it will not be presented fairly and squarely to the judiciary, and those erudite in the law will be confused only to a lesser degree than Parliament.

A comprehensive and exhaustive analysis of concepts employed in framing Acts of Parliament, and the implications of such concepts, might be useful, because of the awareness this might engender. But the effectiveness of Parliament has its limits.[2] In a complex legal matter the non-lawyers in Parliament may well be at a disadvantage, and even the lawyers, bearing in the mind the weight of resources of a modern department of state which can be brought to bear on a matter regarded by the department as crucial, might well only be wise after the event. Two obvious problems seem to be to ensure (i) that a measure goes as far and achieves the precise effect that the Minister claims or implies that it does; and (ii) that it is not easy to create exceptions to important general rules expressed in an Act, at least by anything short of an express provision in the Act creating the exception. A partial remedy for the latter is easier to suggest than any remedy for the former. It should not be beyond the vigilance and awareness of Parliament to eliminate the " procedure by stealth " approach whereby important exceptions are created to equally important general rules by the simple expedient of silence. The problem of obtaining a reasonable coincidence between ministerial pronouncements about the effects of a proposed measure and the terms of the measure interpreted by the courts is much more difficult

Parliament when it is debating new social legislation? . . . In other spheres, when the attention of Parliament is drawn to an alleged inroad on established principle, public interest has been awakened and an opportunity given for judging such a policy on its merits."

This seems to be an accurate statement of the problem, but it is not enough to hope that some indefatigable M.P. will, some day, command sufficient resources and perseverance to compel investigation even on isolated instances. The problem is likely to remain because it is in the executive's interest that this state of affairs should continue, particularly with, as Dr. Edwards points out, the increasingly frequent use of the doctrine of " absolute liability with lip-service to the doctrine of *mens rea*" (p. 247).

2 Apart from the general and universal limitations of a large representative assembly, those features of the British constitution which can increase its effectiveness are often at the mercy of the executive. The tradition of taking the committee stage of Bills of constitutional significance on the floor of the House instead of in standing committee seems to be dependent on the requirements of the Government (see Herbert Morrison, *op. cit.*) A motion to take the Committee stage of the Statutory Instruments Act on the floor of the House was defeated—with the whips on (1945–46 Vol. 415, col. 1159). In addition the device of having general rules in one enactment but subject to express application by subsequent enactments, *e.g.*, Crown Proceedings Act, means that although the principal Act may be taken by a committee of the whole House the all-important matter of exclusions and exceptions by silence in subsequent statutes is not so taken—and it is difficult to argue that the application of a constitutional enactment is of so much less importance than the Act which expresses the rules but does not apply them.

but, in spite of some assertions implying the contrary, the responsibility seems to lie rather more with Parliament than the courts [3]; for until Parliament clearly pronounces on issues there is little general ground for pleading judicial misinterpretation in defence or even mitigation of Parliament. And Parliament cannot clearly pronounce unless the issues are before it.[4] Perhaps, as with many other problems, a critical eye on parliamentary procedure, particularly regarding notions of the function of parliamentary committees, would suggest remedies.[5] But the notion of a panel of "clause-tasters," [6] intermediate between Parliament and the courts, to determine the intention

[3] See J. L. Montrose, "Judicial Implementation of Legislative Policy" (1957) 3 *University of Queensland Law Journal* 139. This illuminating analysis could do much to remove certain ambiguities from judicial interpretation, but the effect of Professor Montrose's precise logic will have severe limitations so long as the executive finds advantage in confusing Parliament as to the precise consequences of the instruments it is asked to formally approve. It is interesting to note that Professor Montrose criticises the "inarticulate premiss . . . that the courts should read statutes in the same way as they would be read by those to whom they are addressed and whose behaviour they seek to control" (p. 146). It may well be that a thoroughgoing application of this doctrine would achieve a greater coincidence between the judicial interpretation of a statute and *what Parliament thought it had approved*, as distinct from the "*intention of the Executive*," and by so eliminating executive advantage inherent in the present system urge the executive to place the issues fairly and squarely before Parliament.

[4] See J. A. G. Griffith, "The Place of Parliament in the Legislative Process" (Part II) (1951) 14 *Modern Law Review* 425 for excellent illustrations of the extreme technicality of some subject-matter upon which legislation is necessary and yet upon which a representative assembly, such as Parliament, is scarcely a competent or appropriate body to pronounce. This analysis clearly demonstrates one kind of limitation to which a large representative assembly is subject, but an appreciation of such limitations surely strengthens the case for full and precise explanations to Parliament of the effects—if not of subordinate rules—of provisions in Acts of Parliament and places a real duty on Ministers to present the issues behind any provision fairly and squarely to Parliament. And Professor Griffith indicates a government attitude inconsistent with this when he says: "To the Government a Bill is not primarily a document designed to enable Parliament to consider those matters which are its particular concern but a potential Act on which administration will be based" (p. 434).

[5] It is often asserted that specialised committees, *e.g.*, on the model of the United States, tend to reduce Parliament to a rubber stamp. Even if this is so, and no means could be devised to eliminate or even modify this—and the Scottish Grand Committee provides a useful guide to the operation of a specialised committee operating within the British parliamentary system—it is open to question whether Parliament as a rubber stamp—with a rather confused and confusing design—to the executive, is preferable to being a rubber stamp for elected committees of its own choosing and of its own members.

[6] Lord MacDermott, *Protection from Power under English Law* (The Hamlyn Lectures, London, 1957).

After reviewing some of the difficulties confronting parliamentary draftsmen and indicating their achievements, the Lord Chief Justice says: "Yet I cannot but think that much might be gained, in appropriate cases, by trying out the text of a new measure, before publication, on a small panel kept for the purpose, whose essential qualifications would be intellectual competence, a substantial background of practical legal experience and a complete ignorance of all departmental instructions for the draft set before them" (p. 69). On the other hand, see (1958) 74 *Law Quarterly Review*: "The work of the statutory draftsmen is so expert at the present time that it is reasonable to assume that the words of an Act, construed in the usual way, represent the intention of Parliament" (p. 470).

expressed in any new enactment, might well not only aid the courts but also give Parliament a clearer idea of the expression of intent that it has formally approved. And this need not detract from parliamentary sovereignty; it might give it better expression.[7] Of course, if ministerial statements to Parliament regarding the intent and purport of a Bill were strong evidence in court of the "intention of Parliament" there might well be a greater coincidence between pronouncement in *Hansard* and the formal terms of the Act of Parliament.

[7] See also W. Ivor Jennings, "Judicial Process at its Worst" (1937) 1 *Modern Law Review* 111.

CURRENT SURVEY

PAGE

United Kingdom 75
Commonwealth and Dependent Territories 95

This digest, which has been compiled by Gordon Borrie, Barrister-at-Law, covers the period October 1, 1960, to December 31, 1960.

UNITED KINGDOM

Courts

Judicial Appointments and Salaries

Metropolitan Magistrates. The Judicial Offices (Salaries) Order, 1960, increases the salaries of the metropolitan magistrates, other than the chief magistrate, from £3,800 a year to £4,100 a year (S.I. 1960 No. 2162).

Supreme Court. The Administration of Justice (Judges and Pensions) Act, 1960 (9 Eliz. 2, c. 3), received the Royal Assent on December 20, 1960. Section 1 increases the maximum number of judges of the High Court from forty-two to forty-eight, and authorises the appointment of three more Lords Justices of Appeal. Sections 2 to 7 modify the pensions arrangements applicable to certain judicial officers and contain the necessary financial and consequential provisions.

Legal Aid and Advice

England. A motion to annul the Legal Aid (Assessment of Resources) Regulations, 1960 (S.I. 1960 No. 1471) ([1960] P.L. 396), was moved in the House of Commons on December 6, 1960, but withdrawn (631 H.C. Deb. 1205–1217).

The Legal Aid and Advice Act, 1949 (Commencement No. 9) Order, 1960, brought into force on December 1, 1960, the provisions of Part I of the Act, for the purpose of making legal aid available in connection with proceedings in the House of Lords in the exercise of its jurisdiction in relation to appeals from the Court of Appeal or a Divisional Court of the High Court in England (S.I. 1960 No. 2056).

The Legal Aid (General) (Amendment No. 3) Regulations, 1960, make amendments to the Legal Aid (General) Regulations, 1960, required by the extension of legal aid to appeals to the House of Lords. They also make a number of minor amendments (S.I. 1960 No. 2057).

The Legal Aid (General) (Amendment No. 4) Regulations, 1960, raise to 90 per cent. the proportion of taxed costs allowed as remuneration to counsel and solicitors acting for legally aided persons in all proceedings where the proportion is now 85 per cent. (S.I. 1960 No. 2369).

Scotland. A motion to annul the Legal Aid (Scotland) (Assessment of Resources) Regulations, 1960 (S.I. 1960 No. 1395) ([1960] P.L. 396), was negatived in the House of Commons on December 6, 1960 (631 H.C. Deb. 1218–1225).

The Legal Aid (Scotland) Act, 1949 (Commencement) (No. 5) Order, 1960, brought into operation on December 1, 1960, provisions enabling the introduction of a scheme for making legal aid available to persons of modest means

in connection with appeals to the House of Lords from the Court of Session (S.I. 1960 No. 2092).

The Legal Aid (Scotland) (Assessment of Resources) Amendment Regulations, 1960, make minor amendments in the Legal Aid (Scotland) (Assessment of Resources) Regulations, 1960, required by the extension of legal aid to proceedings in the House of Lords on appeal from the Court of Session (S.I. 1960 No. 2194).

The Legal Aid (Scotland) (General) Regulations, 1960, consolidate the provisions contained in the Legal Aid (Scotland) (General) Regulations, 1950 to 1960, which relate to legal aid for litigation. They incorporate minor amendments required by the extension of legal aid to proceedings in the House of Lords on appeal from the Court of Session (S.I. 1960 No. 2195).

Crown Liability

Crown Servants

Dismissibility. The plaintiff's appeal in RIORDAN *v.* WAR OFFICE [1960] P.L. 75, has been dismissed by the Court of Appeal without affecting the points of law decided in the earlier judgment: [1960] 3 All E.R. 774n.

Education

Debate

On November 7, 1960, the House of Commons debated education (629 H.C. Deb. 655–784).

Universities

State Scholarships. On December 21, 1960, the House of Commons debated the Government's decision that, as from the summer of 1962, no further awards of State Scholarships would be made (632 H.C. Deb. 1366–1383).

University Grants Committee. The returns from Universities and University Colleges in receipt of Treasury Grant, Academic Year 1958–59, have been published (Cmnd. 1166).

Youth Service

The Ministry of Education (Welsh Department) has issued a Circular on Progress and Further Development (Circular No. 11/60).

Government Functions and Appointments

Ministers' functions

Health. Part II of the report of the Ministry for 1959, being the annual report of the Chief Medical Officer, has been published (Cmnd. 1207).

Parliamentary Secretaries. The Ministers of the Crown (Parliamentary Secretaries) Act, 1960 (9 Eliz. 2, c. 6), received the Royal Assent on December 20, 1960. Section 1 removes the existing limits on the numbers of Parliamentary Secretaries in the departments other than the Treasury, and substitutes an aggregate limit of thirty-three, which is one more than the total of those to whom salaries may be paid under the existing law. Section 2 provides for the payment of a salary of £2,500 a year to a Parliamentary Secretary to the Minister of Science. The new Parliamentary Secretary is included in the aggregate limit of thirty-three prescribed by section 1. Section 3 increases the salary of the Captain of the Gentlemen-at-Arms from £2,200 to £3,000 a year. Sections 4 and 5 make consequential amendments and repeals and provision for the additional annual charge on the Exchequer.

Post Office. The report and commercial accounts for 1959–60 have been published (Cmnd. 1206).

Research

Advisory Committee on Scientific Policy. The report for 1959–60 has been published (Cmnd. 1167). The House of Lords debated the report on November 9, 1960 (226 H.L. Deb. 405–476).

Highways

Access

The defendants' petition for leave to appeal from the decision of the Court of Appeal [1960] P.L. 77, was granted by the Appeal Committee of the House of Lords: Ching Garage, Ltd. *v.* Chingford Corporation [1960] 1 W.L.R. 1185.

Private Street Works

In considering whether a footpath constituted a highway repairable by the inhabitants at large it was decided that (1) where a road dedicated to the public is only used as a footway, this does not exempt it from section 23 of the Highway Act, 1835; (2) premises which are separated from a street by an intervening footpath may be "premises adjoining the street" within section 6 (1) of the Private Street Works Act, 1892; (3) the justices have no power under section 8 of the Private Street Works Act, 1892, to amend a resolution of the local authority by inserting matters which could have been but were not included in the resolution.

A road was laid out in 1885 by a private individual, running along a footpath repairable by the inhabitants at large. The road was thereafter used only as a footway, and had never been repaired by the local authority. In 1956 the local authority passed a resolution under section 6 of the Private Street Works Act, 1892, to carry out certain works to the road and to apportion the expenses upon the premises fronting, adjoining or abutting on the road, including premises separated from the road by the footpath. Later the authority approved a specification which included certain works of lighting and drainage not referred to in the resolution. The works were objected to by the owners of premises included in the apportionment, and the resolution and apportionment were quashed by the justices on the ground that the road and footpath together constituted a highway repairable by the inhabitants at large, but held that if necessary the resolution could have been amended by them to refer to the lighting and drainage works. On appeal by the local authority, *held* (1) that the footpath did but the road did not constitute a highway repairable by the inhabitants at large; (2) the justices had no power to amend the resolution in the above manner; (3) that the premises separated from the highway by the footpath adjoined the road: Ware U.D.C. *v.* Gaunt [1960] 1 W.L.R. 1364; [1960] 3 All E.R. 778.

Once a road has been made at the expense of a private person it does not cease to be within section 23 of the Highway Act, 1835, by reason of its subsequent dedication as a footpath. A private person laid out a road at some date after 1835 and the road was subsequently dedicated to the public as a footpath. The justices quashed a resolution of the local authority to carry out works to the road under the Private Street Works Act, 1892, on the ground that it was a highway repairable by the inhabitants at large. On appeal, *held* that the road had never become repairable by the inhabitants at large, as the conditions laid down by section 23 of the Highway Act, 1835, had never been complied with, and the subsequent dedication as a footpath made no difference: Margate Corporation *v.* Roach [1960] 1 W.L.R. 1380n.; [1960] 3 All E.R. 774, D.C.

Housing

Debates

The House of Commons debated the housing situation on October 26, 1960, and on November 8, 1960 (627 H.C. Deb. 2497–2536; 629 H.C. Deb. 843–968).

Returns

The Housing Returns for Scotland (Cmnd. 1205) and for England and Wales (Cmnd. 1208), September 30, 1960, have been published.

Summary

A Summary has been published of the number of new houses built in Great Britain up to October 31, 1960 (Cmnd. 1228).

Inquiries

Transport

Air. The report has been published of the inquiry on the accident to Elizabethan aircraft G-ALZU at Munich on February 6, 1958 (C.A.P. 167).

Railway. The reports have been published on (a) the collision on April 1, 1960, at Herne Hill (June 28, 1960); (b) the collision on April 25, 1960, between Garforth and Micklefield (September 15, 1960); (c) the collision on July 25, 1960, at Newcastle Central Station (September 29, 1960).

Local Government

Finance

Grant. The General Grant Order, 1960, prescribes for the years 1961–62 and 1962–63—(a) the aggregate amount of the general grants payable under Part I of the Local Government Act, 1958, to the councils of counties and county boroughs in England and Wales and the Council of the Isles of Scilly; (b) matters which are to be, or may be, prescribed under Part III of the First Schedule to that Act, which determines the amount of the general grant payable to any such authority, subject to (c); and (c) that the amount last described shall be reduced by the product of a rate of eightpence in the pound (S.I. 1960 No. 2292).

An accompanying report by the Minister of Housing and Local Government states that account has been taken of the effect of increased remuneration, possible further increases in pay and prices, developments in education and in the local health and welfare and fire services, and developments in child care, police traffic patrols and planning (H.C. 15 of 1960–61; for debate, see 631 H.C. Deb. 1455–1507, December 8, 1960).

The Grants and Rates (Transitional Adjustments) Regulations, 1960, apply section 15 of the Local Government Act, 1958, which provides for contributions to or by rating authorities in respect of the loss or gain accruing from the coming into operation of sections 1 to 7 and 9 to 14 of the Act, to the years 1961–62 and 1962–63 as well as the years 1959–60 and 1960–61, and fix the amount of the contribution to a rating authority for each of the years 1961–62 and 1962–63. The Regulations also provide for certain variations, in the further provisional and conclusive estimates of losses and gains accruing to rating authorities, in the assumptions to be made in estimating the rates which would have been required to be levied in the year 1957–58 if sections 1 to 5, 7, 9, and 12 to 14 of the Act had been in force for that year (S.I. 1960 No. 2293).

The Local Government (General Grant Transitional Adjustments) (Scotland) Regulations, 1960, provide that the transitional adjustments under section 18 of the Local Government and Miscellaneous Financial Provisions (Scotland) Act, 1958, shall continue meantime for two further years, *viz.*, 1961–62 and 1962–63, and that any losses incurred by local authorities owing to the coming into operation of sections 1, 2, 4, 6 and 7 of the Act, as ascertained under section 18, shall be made good as to eight-tenths in 1961–62 and seven-tenths in 1962–63 (S.I. 1960 No. 2196).

The General Grant (Scotland) Order, 1960, prescribes for the years

1961–62 and 1962–63 the aggregate amount of the general grants payable under Part I of the Local Government and Miscellaneous Financial Provisions (Scotland) Act, 1958, to county and town councils in Scotland (S.I. 1960 No. 2324).

For debate on these two statutory instruments affecting Scotland, see 631 H.C. Deb. 1508–1571, December 8, 1960.

Rating and Valuation. The following decision has been reported on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955: PARKER *v.* EALING BOROUGH COUNCIL [1960] 1 W.L.R. 1398.

In deciding whether the subscriptions paid by members of a society are "voluntary" within the meaning of the proviso to section 1 of the Scientific Societies Act, 1843, the amount of the subscription must be weighed against the benefit received in return. *Quaere,* how far, in deciding whether a society is instituted for particular objects for the purpose of the section, it is permissible to look at its present activities as opposed to its charter.

The object of an institution was declared to be "to promote the development of mechanical engineering and to facilitate the exchange of information and ideas thereon." Engineers found membership advantageous for education, for associating with each other and receiving publications, and for the status it gave them. The income of the institution was £168,000, of which £138,000 came from subscriptions. The cost of issuing publications to members was 30 per cent. of the last figure. *Held* that the institution was not entitled to exemption from rates under section 1 of the Scientific Societies Act, 1843, because (1) it was not formed for the purpose of the science exclusively but also of the art, industry or profession of engineering; (2) it was not supported by "voluntary" contributions as members had substantial benefits for their subscriptions: INSTITUTE OF MECHANICAL ENGINEERS *v.* CANE [1960] 3 W.L.R. 978, H.L. (affirming decision of C.A. [1960] P.L. 79).

On November 30, 1960, the Rating and Valuation Bill received a second reading (631 H.C. Deb. 393–529).

London

Royal Commission. The Report of the Royal Commission on Local Government in Greater London, 1957–60 (Chairman: Sir Edwin Savory Herbert, K.B.E.) (with maps) has been published (Cmnd. 1164). Appendix II to the Minutes of Evidence have also been published (H.M.S.O. 73–35–0–2).

The general conclusions reached unanimously by the commissioners (who were appointed by Royal Warrant on December 10, 1957) are that the London County Council (L.C.C.) should be succeeded by a new Council for Greater London covering a much enlarged area, and that the primary unit of local government in this area should be fifty-two Greater London boroughs with the status and constitution of municipal boroughs and a population range of 100,000 to 250,000. This would involve reducing by about half the number of local authorities, mainly by amalgamation.

The commission was appointed "to examine the present system and working of local government in the Greater London area (the Metropolitan Police District, the City of London, and certain adjacent areas in the counties of Middlesex, Kent, Surrey, Essex and Hertfordshire); and to recommend whether any, and if so what, changes in the local government structure and the distribution of local authority functions in the area, or in any part of it, would better secure effective and convenient local government. . . ." In an introductory passage in their report, the commissioners state that they believed that the fundamental question facing them was not "How can the growth of London be stopped?" but "How can London's abounding vitality be guided and directed for the general good through the medium of self-government?" London had survived the chances and changes of 2,000 years, invasion,

pestilence, fire, bombing; year by year, at ever-growing pace, it had absorbed into itself strangers from other parts of the country and from foreign lands, had taught and learnt new occupations and means of livelihood, and had eagerly embraced new ways of life made possible by scientific discovery and mechanical ingenuity. It had constantly attracted people to itself from outside, and at the same time grown constantly from the centre outwards. The commissioners did not conceive it part of their function to propose that the visible evidence of history embodied in the traditional institutions of the metropolis, as in its ancient buildings, should be destroyed or obscured, but rather to suggest a means of building on the past as a sure foundation for the present and a means of carrying the present forward into the future.

During the course of their thirty months' work, the commissioners sat for a total of seventy days hearing oral representations, and themselves asked nearly 16,000 questions. They sent letters of inquiry to the Lord Mayor, Mayor or chairman of every local authority in the review area, and to the local authority associations concerned, asking for their comments on those local authority functions or groups of functions which the commissioners considered to be of the greatest importance, *i.e.*, education, environmental health services, housing, personal health and welfare services, town and country planning and highways and traffic. They wrote to the joint boards, the statutory undertakings, the regional hospital boards, the area boards of the nationalised industries in the review area, the Port of London Authority and the Metropolitan Police, and to seven government departments, inviting them to give evidence in respect of the services for which they were responsible. They invited representations from a selected list of professional associations, voluntary bodies, and other bodies thought likely to be able to help with one aspect or another of the inquiry as well as from each university in the United Kingdom. And they paid informal visits to as many local authorities as possible (seventy-nine of the 117 authorities within the review area and one parish council outside) to gain "some familiarity with local authority areas, their nature, their opportunities and their problems, and to see at first hand the administrative arrangements for performing local authority functions."

The commission points out that the review area differs from conurbations in the rest of Britain by reason of its size (538,772 acres or 217,989·4 hectares), the density of its population (8,713,960), the history of its growth, and the overriding predominance of its centre, which has a peculiarly "national" character and draws people from the whole of Greater London and from further afield. Local government within this area derives largely from the Local Government Act of 1888; in the main it is two-tier government with the L.C.C. and the Middlesex County Council as "top-tier" authorities, different from each other and different in substance from any other authority in England and Wales, and the twenty-eight metropolitan boroughs (created by the London Government Act, 1899) of the administrative county of London and the borough and urban districts in the outlying areas as "second-tier" authorities. There are also three county boroughs—Croydon, East Ham and West Ham—which are all-purpose authorities; the City of London, which, as the oldest municipality in the country, possesses ancient and independent powers of its own (although in respect of more recent functions conferred by Parliament, it has participated in the two-tier structure of government in almost the same way as the metropolitan boroughs); and a number of specialised authorities, some with executive powers and some advisory only, created to deal with certain services with which, for one reason or another, neither the traditional nor the more recently constituted local authorities seemed competent to deal.

The commissioners recommend that the conception of an upper and lower tier of authorities should be replaced by the conception of the Greater London borough, performing all the functions which can be performed

within a limited area, and the Council for Greater London, performing functions which can only be or can be better performed over a wider area. The commissioners propose a redistribution of functions between the borough and the Council for Greater London in town and country planning, housing, education, traffic management, highways, etc.

The commissioners recommend that the Greater London boroughs should have the status and constitution of municipal boroughs, *i.e.*, that their councils should be composed of the Mayor, aldermen and councillors, one-third of the councillors being elected each year for a period of three years, and all being eligible for re-election. The Council for Greater London should be directly elected with a member for each parliamentary constituency in Greater London. Elections for this purpose should be held every three years at the same time and place as the election for that year of members for the borough council.

The commissioners recommend exceptional treatment for the City of London, which is unique among local government areas in that its corporation is a corporation, not by statute or charter, but by prescriptive right. In general, the corporation exercises the powers and duties of a metropolitan borough council through the Common Council, but it also engages in a number of other activities as an ancient municipality, the expenses of which are met, for the most part, from corporate funds, known as the City's Cash. The commissioners propose that the City should be a Greater London borough and should discharge the additional functions proposed for these, in spite of the fact that its resident population is only about 5,000 as compared with the population range of about 100,000 to 250,000 for the other proposed boroughs. In general, the City Corporation's relationship with the Council for Greater London should be the same as that of the other boroughs, although a number of matters, including its responsibility for the four City bridges over the Thames, will require special consideration. In other respects, the position of the City should remain unaltered (Commonwealth Survey, C.O.I., November 8, 1960).

The House of Lords debated the Report of the Royal Commission on Local Government in Greater London on December 21, 1960 (227 H.L. Deb. 1025–1096).

Meetings

The Public Bodies (Admission to Meetings) Act, 1960 (8 & 9 Eliz. 2, c. 67), received the Royal Assent on October 27, 1960.

This Act provides for the admission of representatives of the Press and other members of the public to the meetings of certain bodies exercising public functions (s. 1 (1)): these bodies are specified in the Schedule to the Act and include local authorities, rural parish meetings, water boards, education committees, certain bodies constituted under the National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81), including regional hospital boards, and other bodies with power to levy a rate, except police authorities. A body may, by resolution, exclude the public from the whole or part of a meeting whenever publicity would be prejudicial to the public interest by reason of the confidential nature of the business to be transacted or for other special reasons arising out of the nature of the business (s. 1 (2)); section 1 (4) prescribes that notice must be publicly given of meetings and that copies of any agenda must (with certain exceptions) be supplied to any newspaper on request; publication of defamatory matter contained in such agenda or additional particulars supplied therewith shall be privileged unless published with malice (s. 1 (5)). Section 2 provides for the application of the Act and for its extension or restriction by statutory instrument subject to affirmative resolution in both Houses of Parliament (s. 2 (3)).

The Act, which extends to Scotland but not to Northern Ireland, comes into force on June 1, 1961.

Police

Royal Commission. An Interim Report of the Royal Commission on the Police, 1960 (Chairman: Sir Henry Willink, Bt., M.C., Q.C.) has been published (Cmnd. 1222). The Minutes of Evidence taken before the Royal Commission have also been published for Days 1–10 (H.M.S.O. 73–36–1 to 10).

On December 6, 1960, the Secretary of State for the Home Department made a statement in the House of Commons on police pay. He stated that at a meeting on November 30, 1960, the Police Council for Great Britain agreed to accept the scale of pay recommended for the police constable by the Royal Commission, and to bring it into operation on September 1, 1961. The Council also agreed that scales of pay for the other ranks should be negotiated as soon as possible and that they should in due course take effect from September 1, 1961 (631 H.C. Deb. 1070–1072; 227 H.L. Deb. 32–36).

See also TOWN AND COUNTRY PLANNING (below, p. 91).

MONOPOLIES AND RESTRICTIVE PRACTICES

Monopolies Commission

Inquiry on Petrol Sales System. The latest reference to the Monopolies Commission, made by the president of the Board of Trade on September 27, is on the question of the solus sites system of retail sale of petrol in the United Kingdom. The commission is required, if it finds that monopoly conditions prevail in the trade, to investigate whether and to what extent the following things are done by the parties concerned as a result of, or for the purpose of preserving, those conditions: (a) agreements or arrangements are made under which restrictions are accepted by persons, other than the suppliers themselves, carrying on the business of selling petrol to the general public by retail in respect of the supply or acquisition of petrol or of any other goods or substances or in respect of the acquisition or disposal of any premises or any interest therein; (b) supplies of petrol are withheld from persons carrying on the business of selling petrol to the general public by retail; (c) premises are acquired or used, or permitted to be used, for the purpose of there being carried on thereon the business of selling petrol to the general public by retail; and, if so, whether or not any of those things operate, or may be expected to operate, against the public interest.

It has been unofficially estimated that over 90 per cent. of Britain's 36,000 garages are tied to particular groups and contract to sell only one company's petrols.

The other subjects of references at present before the commission are: (a) cigarettes and manufactured cigarette and pipe tobacco; (b) machinery for the manufacture or packaging of cigarettes or of cigarette or pipe tobacco; (c) electrical equipment for mechanically propelled land vehicles.

The last report made by the commission was that on chemical fertilisers ([1960] P.L. 201,) (Commonwealth Survey, C.O.I., October 11, 1960).

Restrictive Practices Court

Decisions. Two co-operative societies with contiguous areas agreed neither to trade nor solicit customers outside their own boundaries. Under a national agreement each was bound to pay to members of other co-operative societies the same " dividend " on goods bought in its shops as it would have paid its own members. The societies contended that the agreement should be supported as preventing overlapping of services and competition, which would have reduced profits and so also the " dividends " paid. *Held*, that the benefit alleged was too slight to save the term of this agreement, that neither society was to trade outside its area, which must be declared contrary to the public interest, but that the term that neither society was to accept members outside its area was not registrable because, read together with the national agreement,

it had no effect on the conditions on which or subject to which goods were sold: *Re* Doncaster and Retford Co-operative Societies' Agreement [1960] 1 W.L.R. 1186; [1960] 3 All E.R. 541, R.P.Ct.

The Wholesale Confectioners' Alliance of Great Britain and Northern Ireland was a trade association of 1,980 wholesalers of confectionery and members of the alliance handled about 90 per cent. of all confectionery sold by wholesalers. Sales of confectionery through wholesalers had declined and direct sales by manufacturers to retailers increased. The alliance issued a schedule of prices at which members were recommended to buy confectionery from manufacturers and a schedule of prices at which members were recommended to sell to retailers. The alliance contended that removal of the restrictions contained in the schedules would deny to the public specific and substantial benefits within paragraph (*b*) of section 21 (1) of the Restrictive Trade Practices Act, 1956. *Held*, that the court was not satisfied that in a free market small retailers would be incapable of profitably comparing the different prices of wholesalers, that the court was not satisfied that it would follow from the loss of schedules that any increase in price by manufacturers would necessarily lead to an increase in the consumer price, and for these and other reasons given by the court, the restrictions must be declared contrary to the public interest: *Re* Wholesale Confectioners' Alliance's Agreement [1960] 1 W.L.R. 1417, R.P.Ct.

In Yarn Spinners' Agreement (No. 2); Cotton Yarn Doublers' Association's Agreement (No. 2) (November 10, 1960) two associations gave undertakings to the Restrictive Practices Court to give the registrar twenty-eight days' notice of their intention to put into effect any restrictions similar to those which had been contained in agreements which had been declared contrary to the public interest. Subsequently, both associations agreed in recommending to their members a set of terms and conditions which were considered to be of no substantial economic significance. The associations proposed that they should be released from their undertakings to an extent which enabled them to make the recommendations if they were approved by the Board of Trade. The Restrictive Practices Court (Pearson J., Sir Stanford Cooper and Mr. W. L. Heywood) *held* that the course which had been adopted was a convenient and proper one. See also [1960] 3 All E.R. 809n. For previous proceedings, see [1959] P.L. 180.

National Health Service

Remuneration

Royal Commission. On December 5, 1960, the House of Commons in Committee of Supply agreed to Supplementary estimates to implement the recommendations of the Royal Commission on Doctors' and Dentists' Remuneration (631 H.C. Deb. 981–1024).

See also Government Functions and Appointments (above, p. 76) and Tribunals and Judicial Functions of Ministers (below, p. 93).

National Insurance

Contracting Out

On October 26, 1960, in a written answer, the Minister of Pensions and National Insurance stated that 4,767 pension schemes had been submitted to the Registrar and 1,953 formal applications made for a certificate that employments should be non-participating employments for the purposes of the National Insurance Act, 1959.

Contributions

Arrears of national insurance contributions although recoverable as a penalty under regulation 19 (5) of the National Insurance (Contributions) Regulations, 1948, are a civil debt, and are not a penalty which can be

mitigated by the justices. L. pleaded guilty to the offence of failing to pay a national insurance contribution, and admitted that he had failed to pay other contributions totalling £19 16s. Having regard to his financial circumstances, the justices fined him only 15s. and reduced the arrears to £5 payable by instalments. On appeal by the prosecutor, *held*, the justices had no jurisdiction to mitigate the arrears; the case should be remitted: LEACH *v.* LITCHFIELD [1960] 3 All E.R. 739, D.C.

Decisions of the Commissioner

Approved Form for Claim: Decision No. R(U) 9/60.

Earnings—offset of loss from one occupation against profit from another: Decision No. R(P) 2/60.

Incapable of Work. A company director fifty-seven years of age, suffering from neurasthenia, had for seven years been certified incapable of work. Two medical officers of the Ministry of Health had reported that he was not incapable of following his normal occupation. The claimant was given an opportunity to consult a neurologist who reported that claimant was capable of work that did not demand fine movements. A medical officer of the Ministry of Pensions and National Insurance considered that the claimant had a neurosis and was not fit to undertake the work of a company director, but that there were many forms of work which the claimant could do. *Held* that the claimant was not incapable of work; although he could not undertake the duties of a company director, he could undertake light work on a part-time basis. While, in the case of an illness of short duration a claimant's capacity for work should be judged by reference to his normal field of employment, when the claimant's disabilities last for a long period, the field of employment to be taken into account must be enlarged: Decision No. R(S) 7/60.

Normal Idle day—shift worker employed on a rota: Decision No. R(U) 15/60.

Retired from regular employment. A man aged sixty-seven gave up his regular occupation of refuse collector and took part-time employment as a general help at a shop, unpacking goods and keeping the premises clean. He did very little heavy work. His working hours were sixteen-and-threequarters spread over two-and-a-half days each week. *Held* that the work was of a kind a retired person might reasonably be expected to do and was not inconsistent with retirement. Principles laid down in Decision R(P) 8/54 applied. Decision R(P) 11/56 distinguished: Decision No. R(P) 3/60.

Seasonal Worker. A seasonal worker claimed unemployment benefit during an off-season of sixty-nine days. *Held,* in deciding what was a substantial amount of employment in that off-season, that eighteen was the lowest number of whole days which was "not less than one-fourth" of the off-season: Decision No. R(U) 6/60.

Short Working Week. A man claimed an increase of benefit for his wife for February 20, 1959. His wife normally worked a five-day week, but because of short-time she did not work in her pay-week ending Saturday, February 21, 1959. *Held* that, applying the principles of Decision R(U) 4/60, an increase was payable because the wife could not be said to have been engaged in a gainful occupation from which her weekly earnings exceeded forty shillings during that pay week: Decision No. R(U) 8/60.

For other decisions on short-time working, see Decision No. R(U) 13/60 and Decision No. R(U) 14/60.

Trade Dispute. The claimant was a shipwright. The boilermakers' society were in dispute with the management about certain work which they claimed should be transferred from shipwrights to platers. A withdrawal of labour by members of the boilermakers' society caused a stoppage of work by reason of

which the claimant lost employment. *Held* that, although he did not participate in the dispute, the claimant was directly interested in it. He was directly interested because the work available for him would have been decreased if, as the result of the dispute, the work in question had been transferred to the platers. It was irrelevant that the disputed work did not frequently recur. It did not assist the claimant that the boilermakers' society should have submitted the matter to arbitration. *Held,* also, that a person is directly interested in a trade dispute which relates to the question whether those whom he helps or another class of worker shall be assigned a certain type of work, if the amount of work available for him might be decreased on the settlement of the dispute: Decision No. R(U) 1/60.

For another decision on stoppage of work due to a trade dispute, see Decision No. R(U) 12/60.

Whether unemployed. A salesman in full-time employed contributor's employment, who was paid solely by commission, chose not to work on five days in Christmas week because canvassing would have been a waste of time. He was paid no retaining fee and was free to seek work elsewhere. *Held* that he was not unemployed. His employment was available for him. The limitation of his working time was not imposed by his employer, in contrast with the temporary suspension of a factory worker by his employer because of a shortage of orders: Decision No. R(U) 11/60.

Modification of Teachers' Superannuation Acts

The National Insurance (Modification of Teachers Superannuation Acts) Regulations, 1960, modify the Teachers (Superannuation) Acts so as to ensure that, where a teacher's pension is to be reduced, either because service has been counted both for that pension and for another pension paid for out of public funds or because the teacher's retirement has been accelerated by misconduct, the amount remaining after the reduction shall not be less than the maximum graduated National Insurance pension which would have been payable had the employment not been non-participating employment within the meaning of the National Insurance Act, 1959.

The regulations also make minor amendments to the Teachers (Superannuation) Acts consequent upon the power given by the National Insurance Act, 1959, to recover a payment made in lieu of contributions when a person's employment in non-participating employment comes to an end (S.I. 1960 No. 2230).

National Insurance Act, 1960

The National Insurance Act, 1960 (9 Eliz. 2, c. 5) received the Royal Assent on December 20, 1960. The Act amends the rates or amounts of contributions and benefits under the National Insurance (Industrial Injuries) Acts, 1946 to 1959, and the National Insurance Acts, 1946 to 1959, not being graduated contributions or graduated retirement benefit. Section 3 modifies the provisions of the National Insurance Act, 1946, under which persons are treated as having retired.

The National Insurance Act, 1960 (Commencement) Order, 1960, brought into operation section 3 of the Act on December 30, 1960, and brings into operation the other principal provisions of the Act on April 3, 1961 (S.I. 1960 No. 2421).

White Papers were published in November, 1960, on the proposed changes in the National Insurance Schemes (Cmnd. 1196) and comprising the Report by the Government Actuary on the Financial Provisions of the Bill (Cmnd. 1197).

Non-Participation

A motion to annul the National Insurance (Non-Participation—Assurance of Equivalent Pension Benefits) Regulations, 1960 (S.I. 1960 No. 1103) was

negatived in the House of Commons on November 8, 1960 (629 H.C. Deb. 973–1000).

For new sets of Regulations see S.I. 1960 Nos. 1785, 2179, 2185, 2285, 2288.

The Ministry of Housing and Local Government and the Scottish Home Department have issued circulars drawing the notice of local authorities to regulations made empowering the Minister (or Secretary of State for Scotland) to act instead of employers for certain purposes connected with the new National Insurance Scheme, and asking those authorities to take action on the Minister's behalf in giving notice to their employers of the Minister's intention to apply for the necessary certificate that certain employments should be non-participating employments for the purposes of that Scheme (Circular No. 53/60; Circular No. 9677).

National Insurance (Industrial Injuries)

Decisions of the Commissioners

Carbon Monoxide Poisoning—not caused by accident: Decision No. R(I) 32/60.

Carcinoma of kidney—not caused or worsened by back injury: Decision No. R(I) 25/60.

"Out of and in the course of employment." The claimant, a garage mechanic, who had been doing a job which caused his right sleeve to become soaked with petrol, was receiving instructions from his employer when the latter offered him a cigarette. The claimant struck a match and lit his own and his employer's cigarette and then extinguished the match. Shortly after this the claimant's overalls caught fire and his right arm was burned. *Held* that the accident arose out of and in the course of the claimant's employment. On the evidence it was more probable than not that it was the employer's cigarette which had caused the claimant's sleeve to ignite. The case was therefore quite different from those cases where injury had resulted from a claimant's own act of smoking, for here the claimant's clothing, which had become particularly inflammable because of the conditions of his work, had been set alight by the careless act of another person: Decision No. R(I) 21/60.

In accordance with her normal and authorised practice a stenographer left her place of work on her bicycle to proceed to lunch by way of a stationery store where she was to deposit a stencil. Whilst cycling along her employers' private road to the store she was blown from her cycle by a freak gust of wind and injured. *Held* that the personal injury she suffered arose out of and in the course of her employment. She was travelling on duty when the accident occurred and as the proximate cause of the accident was her fall from the cycle it was not necessary to consider any remote cause: Decision No. R(I) 27/60.

While in the course of his employment a groundsman, who was smoking a cigarette, entered a small hut in which he kept a motor mower and some cans of petrol. The day was very hot and the floor of the hut was impregnated with oil. A few moments after he entered the hut it erupted in flames and he was killed. *Held* that the deceased's death was not caused by accident arising out of and in the course of his employment. Section 7 (4) of the Industrial Injuries Act did not assist the claimant, for smoking a cigarette was not incidental to the deceased's employment and the fact that the deceased was smoking when he entered the hut amounted, in the circumstances of this case, to evidence from which it could reasonably be inferred that the accident did not arise out of his employment. Accordingly it was for the claimant to show on balance of probabilities that the deceased's accident arose out of his employment and this she failed to do, as the strong probability was that the

deceased's cigarette had caused the accident. Decisions Nos. R(I) 68/52 and R(I) 9/60 followed: Decision No. R(I) 30/60.

The claimant, a coalman, who, in addition to delivering coal, collected instalments due from customers, used his own car for this latter purpose and his employer paid him a fixed sum for petrol and general maintenance of the car. The claimant came to an arrangement with a garage proprietor friend whereby the claimant greased his own car using his friend's equipment and paid a less sum than he would have done had the friend performed the work. The claimant was injured when greasing his car. *Held* the accident did not arise out of and in the course of the claimant's employment, for it was no part of his employment that he should grease his own car: Decision No. R(I) 31/60.

Prolapsed intervertebral disc—not the result of an accident eleven weeks earlier: Decision No. R(I) 33/60.

Special Hardship Allowance. Claimant, since 1948 in receipt of a 20 per cent. disablement benefit assessment in respect of pneumoconiosis, worked in his regular occupation of coal hewer until December, 1958, when the colliery closed. For some months prior to the closure he and the other six remaining coal hewers (who were all pneumoconiotics assessed at 10 per cent. or less) were given assistance with their work not because they had asked for it but possibly because there was labour to spare. When the colliery closed all seven were transferred to lower grade work and each claimed special hardship allowance. They had all been issued with a "letter of advice." After his transfer to lower grade work the claimant had two periods of incapacity due to respiratory ailments. *Held* that the claimant was entitled to special hardship allowance. In his case the presumption raised by regulation 37 of the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations had not been rebutted: Decision No. R(I) 34/60.

A coalminer who had worked as a coal hewer in a wet and dust-free pit for approximately ten years after developing pneumoconiosis lost his employment when the pit closed. He afterwards worked as a labourer at another pit. All the medical boards who had examined him had advised that he could continue in the coal mining industry without danger to his health provided that he worked in approved dust conditions and was medically examined by the board at intervals. His degree of disablement had been assessed throughout at less than 5 per cent. or 1 per cent. to 5 per cent., and there was medical evidence (apart from the "letter of advice") that the claimant was capable of following his regular occupation as a coal hewer. *Held* that the claimant was not incapable as the result of pneumoconiosis of following his regular occupation. The extent of disablement was slight and there were local coal faces in which it would not be unsafe for him to work. The effects of regulation 37 of the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations 1959 discussed: Decision No. R(I) 35/60.

For other decisions on claims to Special Hardship, see Decision No. R(I) 22/60, Decision No. R(I) 24/60, Decision No. R.(I) 26/60, Decision No. R(I) 28/60.

Suicide due to accident: Decision No. R(I) 36/60.

Tuberculosis of the Spine—not due to strain at work: Decision No. R(I) 23/60.

Widow's pension—cessation on remarriage or cohabitation—"remarriage" bigamous: Decision No. R(I) 29/60.

See also National Insurance (above, p. 83).

Nationalised Industries

General

Debate. On October 26, 1960, the House of Lords debated the fuel and power industry (225 H.L. Deb. 1100–1146).

Airways

Air Transport Advisory Council. The Report of the Council for 1959–60 has been published with a statement by the Ministry of Aviation (H.C. 278 of 1959–60).

Guarantees. The Treasury has issued statements of guarantees on loans proposed to be raised by the British European Airways Corporation (H.C. 342 of 1959–60) and the British Overseas Airways Corporation (H.C. 343 of 1959–60).

Select Committee. A Special Report from the Select Committee on Nationalised Industries has been published, containing the replies of the Air Corporations and the comments of the Minister of Aviation on the Select Committee's Report in Session, 1958–59, on the Air Corporations (H.C. 339 of 1959–60).

Electricity

Guarantees. The Treasury has issued statements of guarantee on loans to be raised by the Electricity Council (H.C. 344 of 1959–60), the North of Scotland Hydro-Electric Board (H.C. 346 of 1959–60), and the South of Scotland Electricity Board (H.C. 347 of 1959–60).

Gas

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the Gas Board (H.C. 345 of 1959-60).

Report and accounts have been published of the twelve Gas Boards and Consultative Councils for 1959–60 (H.C. 318–329 of 1959–60) and of the Gas Council (H.C. 330 of 1959–60).

The associated report of the Minister of Power, 1959–60, has also been published (H.C. 331 of 1959–60).

Transport

Debates. On October 26, 1960, the House of Commons debated the Report and Accounts of the British Transport Commission for 1959 (H.C. 226 of 1959–60) and the Report from the Select Committee on Nationalised Industries, relating to British Railways (H.C. 254 of 1959–60) (627 H.C. Deb. 2358–2490).

On December 7, 1960, the House of Lords debated Problems of Transportation (227 H.L. Deb. 62–178).

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the British Transport Commission (H.C. 348 of 1959–60).

Reorganisation. The Government has put forward proposals for the future structure, working, and financial reorganisation of the nationalised transport undertakings. The Government has decided to replace the British Transport Commission and the existing organisation by a new structure designed to overcome the main defects and disadvantages of the present organisation, to reconstruct the finances of the Commission and, in particular, those of the railways, and to give the various undertakings the maximum practicable freedom of operation in their commercial affairs (Cmnd. 1248).

Select Committee. Minutes of Evidence and Appendices to the Report from the Select Committee on Nationalised Industries, relating to British Railways, have been published (H.C. 254–I of 1959–60).

Stedeford Recommendations. On November 30, 1960, the Joint Parliamentary Secretary, Ministry of Transport, stated in the House of Lords that the Government does not intend to publish the Report of the Stedeford Advisory Group on British Railways (226 H.L. Deb. 1123–1128).

Parliament

Control of Expenditure

On October 25, 1960, the House of Commons debated the Government's proposals for the improvement of parliamentary procedure for control of expenditure (627 H.C. Deb. 2255–2299).

Estimates Committee (House of Commons)

Reports. The Committee has published its Second Report (Board of Trade) (H.C. 258 of 1959–60); its Third Report (Central Office of Information) (H.C. 259 of 1959–60); and its Fifth Report (Historic Buildings and Ancient Monuments) (H.C. 274 of 1959–60).

The Committee has also published its First Special Report (the appointment of sub-committees and allocation of estimates to sub-committees) (H.C. 9 of 1960–61); its Second Special Report (Service Estimates—major variations) (H.C. 10 of 1960–61); its Third Special Report (Admiralty Headquarters Organisation) (H.C. 11 of 1960–61); its Fourth Special Report (Colonial Office) (H.C. 26 of 1960–61); and its Fifth Special Report (Board of Trade) (H.C. 30 of 1960–61).

Privilege

Article. On October 25, 1960, a complaint of privilege was raised in the House of Commons, concerning an article in *Reynolds News* on invitations made to Members of Parliament by the Government of the Central African Federation. On October 26, 1960, the Speaker ruled that there was no prima facie case of breach of privilege (627 H.C. Deb. 2157–2159 and 2355–2357).

Mr. Nabarro. On November 16, 1960, the Speaker ruled that no prima facie breach of privilege was disclosed by the publication in *The Times* of a letter from Mr. Randolph Churchill referring to a statement in the House by Mr. Gerald Nabarro (630 H.C. Deb. 218–219 and 385–387).

Viscountcy of Stansgate. On November 29, 1960, the House of Commons agreed to refer to the Committee of Privileges a petition that Mr. Wedgwood Benn be not disqualified from sitting in the House of Commons (631 H.C. Deb. 171–174).

Public Accounts Committee (House of Commons)

Reports. The Special Report and First and Second Reports from the Committee (1959–60 session) together with its proceedings, minutes of evidence, appendices and index have been published (H.C. 51–I, 219–I, 256–I of 1959–60).

The Committee has also published, as a Special Report, the Treasury minute on the First and Second Reports from the committee of the 1959–60 session, and an Abstract of Appropriation Accounts (H.C. 19 of 1960–61).

Statutes

Royal Assent. The Public Bodies (Admission to Meetings) Act, 1960 (see above, p. 81), the Administration of Justice Act, 1960 (see below, p. 90), the Professions Supplementary to Medicine Act, 1960 (see below, p. 94), received the Royal Assent on October 27, 1960. The Administration of Justice (Judges and Pensions) Act, 1960 (see above, p. 75), the Ministers of the Crown (Parliamentary Secretaries) Act, 1960 (see above, p. 76), and the National Insurance Act, 1960 (see above, p. 85) received the Royal Assent on December 20, 1960.

See also Government Functions and Appointments (above, p. 76) and Nationalised Industries (above, p. 87).

Public Authorities

Agricultural Land Commission

The report for 1959–60 has been published (H.C. 334 of 1959–60).

Board of Control

The report for 1959 has been published (H.C. 269 of 1959–60).

Iron and Steel Holding and Realisation Agency

The report and statement of accounts for 1959–60 have been published (H.C. 25 of 1960–61).

New Towns

Reports have been published for 1959–60 of the Development Corporations (H.C. 287 of 1959–60).

Remedies

Certiorari

Power to vary order. The Administration of Justice Act, 1960 (8 & 9 Eliz. 2, c. 65) received the Royal Assent on October 27, 1960. By section 16, where a person who has been sentenced for an offence by a magistrates' court or, on appeal against conviction or sentence, by quarter sessions applies to the High Court for an order of certiorari to remove the proceedings into the High Court, the High Court determines that the magistrates' court or court of quarter sessions had no power to pass the sentence, the High Court may, instead of quashing the conviction, amend it by substituting for the sentence passed any sentence which the magistrates' court had power to impose.

Whether precluded by statute. The Land Commissioner of Ceylon made a determination to acquire certain agricultural land. He purported to act under section 3 of the Land Redemption Ordinance, 1942, but the land had not been transferred to a person in satisfaction of a mortgage debt "due from the owner to such other person" within section 3 (1) (*b*) of that Ordinance. Section 3 (4) provided that the question whether any land which the commissioner was authorised to acquire should or should not be acquired was to be determined by the commissioner, whose decision was to be final. An injunction was sought against the commissioner to prevent his acquiring the land. *Held,* that the point should have been raised by certiorari, but that the decision of the commissioner whether he was authorised to acquire any land was not final: Land Commissioner *v.* Pillai [1960] 3 W.L.R. 626, P.C.

Habeas Corpus

Procedure and Appeal. By section 14 (1) of the Administration of Justice Act, 1960 (8 & 9 Eliz. 2, c. 65), on a criminal application for habeas corpus on order for the release of the person restrained shall be refused only by a Divisional Court of the Q.B.D. whether the application is made in the first instance to such a court or to a single judge in accordance with rules of court; no second application in respect of the same person on the same grounds can be brought except on fresh evidence, and not to the Lord Chancellor even in that event (section 14 (2)); habeas corpus proceedings in respect of a person detained under Part V of the Mental Health Act, 1959 (except under section 73 (2), paras. (*e*), (*f*) of that Act) are deemed to be proceedings in a criminal cause (section 14 (3)). Section 15 (1) provides an appeal in all habeas corpus proceedings, civil or criminal, against an order for the release of a prisoner as well as against the refusal of such an order, except that no appeal lies from an order made by a single judge on a criminal application (section 15 (2)); except where an order for his detention has been made in a criminal cause under section 5 of this Act an appeal under section 15 will not affect the right of a person restrained to be discharged and to remain at liberty regardless of the decision on appeal (section 15 (3)).

In *Re* HOLMES (November 25, 1960) the Divisional Court (Lord Parker C.J. and Streatfeild J.) *held,* dismissing an application for leave to appeal to the House of Lords against a decision of the Divisional Court of March 8, 1960, refusing the applicant a writ of habeas corpus, that the Administration of Justice Act, 1960, only applied to decisions of the court given after the date on which the Act had come into force, namely, October 27, 1960. See also *The Times,* November 26, 1960.

Injunction

On December 1, 1960, the House of Commons, on a motion for the adjournment, debated the prosecutions involved in the case of *Attorney-General* v. *Harris* [1960] P.L. 414–415 (631 H.C. Deb. 684–695).

SCOTLAND

See COURTS (above, p. 75), HOUSING (above, p. 77), LOCAL GOVERNMENT (above, p. 78), TOWN AND COUNTRY PLANNING (below, this page).

SUBORDINATE LEGISLATION

Parliamentary Proceedings

Select Committee on Statutory Instruments (House of Commons). The Committee has been appointed for the session 1960–61 (629 H.C. Deb. 317–320, November 2, 1960).

On November 8 and 22, December 6 and 13, and 20, the Committee considered 158, 15, 25, 1, and 23 instruments respectively and resolved that it was unnecessary to draw the special attention of the House to them. The committee asked for a memorandum from the Secretary of State for Foreign Affairs explaining the Foreign Compensation (Hungary) (Amendment) Order, 1960 (S.I. 1960, No. 1659) (H.C. 5, 5–II, 5–III, 5–IV, 5–V).

Special Orders Committee (House of Lords). In the First, Second and Third Reports, the Committee examined 11 instruments. The Committee found that two instruments raised important questions of policy and principle and that they required the special attention of the House, but that no further special inquiries were necessary before the House decided whether to approve (H.L. (5) (17) (21) of 1960–61).

TOWN AND COUNTRY PLANNING

Agricultural Land

Condition that cottages used for agricultural workers. A planning authority may impose a condition on a planning consent such that the use of the land is restricted according to the circumstances of the person using it so long as the condition can fairly and reasonably be said to relate to any policy under the Town and Country Planning Act, 1947, and is sufficiently certain.

A planning authority gave permission for the erection of cottages in an urban green belt subject to a condition that: "The occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by section 119 (1) of the Town and Country Planning Act, 1947, or in forestry or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid." In an action for a declaration that the condition was void, *held* that it was a valid, enforceable condition binding all persons into whose hands the land might come, for it related to the policy of keeping the green belt for agricultural purposes and as the definition of the agricultural population contained in it followed that in section 115 (2) of the Housing Act, 1936, it could not, without overwhelming evidence, be said to be void for uncertainty:

FAWCETT PROPERTIES *v.* BUCKINGHAM COUNTY COUNCIL [1960] 3 W.L.R. 831; [1960] 3 All E.R. 503, H.L. (affirming decision of the Court of Appeal [1959] P.L. 327).

Development Value

Assessment. Petition for leave to appeal to House of Lords from decision of Court of Appeal [1960] P.L. 417, dismissed by the House of Lords: ROUTH'S TRUSTEES *v.* CENTRAL LAND BOARD [1960] 1 W.L.R. 1388.

Enforcement Notice

Challenging Notice. In a prosecution under section 24 of the Town and Country Planning Act which raises the question whether the enforcement notice was served within four years of the development being carried out, and the development complained of is a change to a discontinuous new use, the justices should ask themselves not whether the new use has been discontinued within the four-year period, but whether the resumption within the four years of the discontinued use amounted to a material change of use of the land.

Every summer from 1953 on an hotel proprietor used the forecourt of the hotel for selling fancy goods, ice-cream and mineral waters. It was not so used out of season. An enforcement notice requiring the use to cease was given in 1957 and the proprietor was prosecuted under section 24. He was convicted by the justices, who, in dealing with the defence that the enforcement notice was out of time, posed to themselves the test whether the use complained of had been discontinued in the winter. On appeal *held,* that the justices had misdirected themselves, and the case should be remitted. They had not decided the true question which was whether the resumption of the use complained of in 1957 was a material change of use.

Per Lord Parker C.J.: "It may be that during the winter months . . . the forecourt has some definite use, such as ingress or egress from the hotel. . . . If it does have a use during the winter months, it seems to me that each May when a change is made there is a change of user and a material change of user. . . . On the other hand it may well be that this little bit of land adjoining the pavement is just as much waste land as the land in *Fyson's* case that it is put to no use whatsoever, and that its only use is the use that is made of it in the summer. In that case, it seems to me that the finding might well be that there is, therefore, in May and September of each year no change in use whatsoever": HAMBLETT *v.* FLINTSHIRE COUNTY COUNCIL (1960) 11 P. & C.R. 284, D.C. (considering *Fyson* v. *Buckinghamshire C.C.* [1958] 1 W.L.R. 634).

Temporary Permission. A person who continues to use land in a way for which temporary planning permission was given after it expires is in breach of a condition of the consent. Therefore an enforcement notice can validly specify that breach under section 23 (2) of the Town and Country Planning Act, 1947, and so bring section 24 (3) of the Act into play, making it an offence to continue the use.

Conditional planning permission was granted for the use of land as a caravan site. One of the conditions was that the permission should expire on a specified date. The accused continued the use after that date and an enforcement notice was served specifying this as a breach of the condition. On a prosecution under section 24 of the Act *held* that the notice was good: DORKING AND HORLEY RURAL DISTRICT COUNCIL *v.* FRY (1960) 11 P. & C.R. 289, D.C.

Grants

Scotland. The Town and Country Planning (Grants) (Scotland) Regulations, 1960, made under section 89 of the Town and Country Planning (Scotland) Act, 1947 (as set out in section 52 of the Town and Country Planning

(Scotland) Act, 1954, and amended by paragraph 10 of the Fourth Schedule to the Local Government and Miscellaneous Financial Provisions (Scotland) Act, 1958): (1) provide for payment of Exchequer grants to local authorities in respect of (a) (Part II of the regulations) expenditure incurred in connection with the acquisition, clearing and preliminary development of land acquired under planning powers for major redevelopment and in respect of land appropriated to planning purposes for such redevelopment; (b) (Part III) expenditure incurred in the payment of expenses in connection with restrictions on coal mining imposed by or under the Act of 1947; and (2) determine the basis and method of calculation of such grants and lay down the terms and conditions of payment (S.I. 1960 No. 2433).

Notice of Inquiry

The Local Government (Compulsory Purchase) Regulations, 1960, which replace existing ones taking into account section 34 of the Town and Country Planning Act, 1959, prescribe the manner in which notice by a county council of an inquiry into a proposal to purchase land compulsorily on behalf of a parish council under section 168 of the Local Government Act, 1933, is to be published and the form of the notice to be given to certain persons (S.I. 1960 No. 2284).

Permission

In 1950 permission was given for the use of seventeen acres of land as a site for thirty-five caravans subject to a condition that the permission was to expire in 1955. This permission was given in an application which included a plan marking sites for individual caravans over most of the seventeen acres. In 1953 a further application was made with a plan showing only part of the seventeen acres, but the application described the land then in question as a caravan site and its then use as a site for thirty-five caravans. The application was for permission to use as a site for sixty caravans, which was granted. On a prosecution for failing to comply with an enforcement notice requiring no more than sixty caravans to be kept on the seventeen acres *held* that, viewed in the light of all the circumstances, the second permission related to the whole of the seventeen acres and revoked the first, so that the total number of caravans permitted was sixty, not ninety-five: KENT *v.* GUILDFORD RURAL DISTRICT COUNCIL (1959) 11 P. & C.R. 255, D.C.

Use Classes

England. The Town and Country Planning (Use Classes) (Amendment No. 2) Order, 1960, excludes betting offices licensed under the Betting and Gaming Act, 1960, from being " shops " or " offices " for the purposes of the Town and Country Planning (Use Classes) Order, 1950. Minor amendments and additions are made in the special industrial groups and the phraseology of Class XVI is altered so as to accord with modern legislation as to mental health and probation and supervision orders (S.I. 1960 No. 1761). The Ministry of Housing and Local Government has issued a circular explaining the purport of the Order (Circular No. 54/60).

Scotland. The Town and Country Planning (Use Classes) (Scotland) Amendment Order, 1960, excludes betting offices licensed under the Betting and Gaming Act, 1960, from being " shops " or " offices " for the purposes of the Town and Country Planning (Use Classes) (Scotland) Order, 1950. It also excludes shops for the sale of motor vehicles from the general class of shop under that Order (S.I. 1960 No. 2014).

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

Agricultural Land Tribunals

Areas. The Agriculture (Areas for Agricultural Land Tribunals) (Amendment) Order, 1960, amends the Agriculture (Areas for Agricultural Land

Tribunals) Order, 1960, by combining the Yorkshire and Lancashire Areas, with the exception of the North Riding of Yorkshire which will be transferred to the Northern Area (S.I. 1960 No. 1885).

Disciplinary Bodies

General Optical Council. The General Optical Council (Disciplinary Committee Rules) Order in Council, 1960, has been made. The Opticians Act, 1958, s. 10, requires the General Optical Council to set up a committee, to be known as the Disciplinary Committee, for the consideration and determination of disciplinary cases referred to them. The rules approved by this Order provide for the constitution of this Committee (S.I. 1960 No. 1934).

The General Optical Council (Investigating Committee Rules) Order in Council, 1960, has been made. The Opticians Act, 1958, s. 9, requires the General Optical Council to set up a committee, to be known as the Investigating Committee for the preliminary investigation of cases in which it is alleged that an individual or body corporate is liable to have his or its name erased from the register or list on certain specified grounds. The rules approved by this Order provide for the constitution of this committee (S.I. 1960 No. 1935).

Professions Supplementary to Medicine. The Professions Supplementary to Medicine Act, 1960 (8 & 9 Eliz. 2, c. 66), received the Royal Assent on October 27, 1960.

This Act provides machinery for registering chiropodists, dietitians, medical laboratory technicians, occupational therapists, physiotherapists, radiographers and remedial gymnasts and makes provisions for regulating their professional education and conduct.

Section 1 and the First Schedule provide for the establishment of the Council for Professions Supplementary to Medicine and a board for each profession (to be known as the Chiropodists Board, the Dietitians Board, etc.) under the general supervision of the Council; the Council will have twenty-one members, of whom seven will be members of the registered professions, seven will be medical practitioners, and seven, including four nominees of the Privy Council, who will include the chairman, will be persons who are members of none of those professions (Sched. I): the Boards will vary in size but the profession concerned will have a majority of one over other members of the Board who will be medical practitioners or professional educators (Sched. I). Section 2 provides for the establishment and maintenance of a register of members by the Board of each profession: these registers are to be open to public inspection (s. 2 (4)). Section 3 prescribes general qualifications for registration and an appeal to the Council is given against the refusal of a Board to register an applicant (s. 3 (3)). Section 4 gives the professional boards power to approve courses, qualifications and training institutions subject in certain cases to the prior consent of the Privy Council. Section 5 makes the professional Boards responsible for the supervision of approved institutions and their examinations for approved qualifications and enables them to appoint visitors and to remunerate them. Section 6 restricts the use of the term state registered chiropodist, etc., to persons whose names are on the relevant register to be established under the Act. Section 7 provides penalties for false representations made to obtain registration. Sections 8, 9 and the Second Schedule provide for practitioners to be struck off the register for crimes or professional misconduct after a preliminary investigation by an investigating committee and a hearing by a disciplinary committee and enable practitioners who are struck off to be registered again if the disciplinary committee so directs; a right of appeal to the Privy Council is given against striking off (s. 9 (3)). Section 10 provides that the Act may be extended to other professions or restricted in its application by order of the Privy Council subject to affirmative resolution in both Houses of Parliament. Section 11 enables the Privy Council to direct the Council or a Board

to fulfil neglected functions and to enforce their directions by mandamus, or, to order the Council to give effect to directions given by them to a Board. Section 12 provides for the exercise of the powers of the Privy Council. Section 13 notices, etc., section 14 short title, etc. The Act extends to Scotland and to Northern Ireland. The Act comes into force on a day or days to be appointed by Order in Council.

Rules of Procedure

On November 21, 1960, the Attorney-General, in a written answer, listed the tribunals where the Council on Tribunals has been consulted before rules of procedure have been made (630 H.C. Deb. 82–83).

Wales

See Education (above, p. 76).

Wireless and Television

British Broadcasting Corporation

Reports and accounts for 1959–60 have been published (Cmnd. 1174).

Independent Television Authority

Report and accounts for 1959–60 have been published (H.C. 1 of 1960–61).

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Colonial Development Corporation

New Chairman. The Secretary of State for the Colonies has appointed Lord Howick of Glendale to be Chairman of the Corporation for three years from December 1, 1960.

Colonial Research

Reports have been published of the Committee for Colonial Agricultural, Animal Health and Forestry Research; Colonial Economic Research Committee; Colonial Fisheries Advisory Committee; Colonial Medical Research Committee; Colonial Pesticides Research Committee; Colonial Road Research Committee; Colonial Social Science Research Council; Tsetse Fly and Trypanosomiasis Committee; Director, Anti-Locust Research Centre and Research Matters not covered by the above Reports of the Specialist Advisory Bodies (Cmnd. 1215).

Basutoland

Order in Council

The Basutoland (Constitution) (Amendment) Order in Council, 1960, dated September 12, 1960, gives effect to the change of title of the Legal Secretary of Basutoland to that of Assistant Attorney-General.

Bechuanaland

Constitutional Proposals

The Government have published as a White Paper (Cmnd. 1159) the details of a proposed new constitution for the Bechuanaland Protectorate,

which it is intended to promulgate by Order in Council. The proposals follow closely the proposals of the Constitutional Committee of the Joint Advisory Council ([1960] P.L. 107–108), subject to certain modifications recommended by the Resident Commissioner and the High Commissioner which have been agreed with the Constitutional Committee.

The High Commissioner will be empowered, with the advice and consent of a Legislative Council, to make laws for the peace, order and good government of the Protectorate.

The Legislative Council will consist of thirty-one to thirty-five members with the Resident Commissioner as President. The composition of the Legislative Council will be as follows: (a) Three *ex-officio* members, namely, the Government Secretary, the Secretary for Finance and the Legal Secretary; (b) twenty-one elected members, of whom ten will be European, ten African and one Asian; (c) seven nominated official members; (d) the High Commissioner will be empowered at his discretion to nominate up to four European and African unofficial members, provided that he nominates an equal number of each. The European elected members will be elected by European voters in ten constituencies. The present European Advisory Council will cease to exist. The African elected members will be elected by an African Council (see below), five from the members of the African Council from the Northern Division and five from those from the Southern Division of the Protectorate. The Asian elected member will be elected by Asian voters.

The qualifications for the European and Asian franchise will be: (a) status of British subject or British protected person; (b) age twenty-one or over; (c) residence in the Protectorate for twelve months; (d) (i) ownership of land or stock in the Protectorate to the value of £200; or (ii) possession of one of the more important types of trading licence; or (iii) income of £200 from any source; or (iv) being the wife of a person so qualified.

The constitution will also contain the usual provisions regarding Her Majesty's power of disallowance and the High Commissioner's reserved powers. The High Commissioner will be required to reserve any Bill affecting the constitution, any Bill relating to the privileges and immunities of the Legislative Council or its members, or any Bill varying the qualifications or disqualifications of voters in elections for membership of the African Council or of the Legislative Council. He will also be required to reserve any Bill in classes to be defined affecting African interests (including any Bill for amending or repealing any customary law or the powers of a chief), if the majority of African members of the Legislative Council have voted against it.

The Executive Council will normally be presided over by the Resident Commissioner, but the High Commissioner may preside when he is in the Protectorate. The Executive Council will consist of the Resident Commissioner, the Government Secretary, the Secretary for Finance, the Legal Secretary and two other officials appointed by the High Commissioner, together with four members nominated by the High Commissioner from among the unofficial members of the Legislative Council, of whom two will be European and two African. The High Commissioner will be instructed, in selecting the unofficial members of the Executive Council, to take account of the views of unofficial members of the Legislative Council, to be ascertained informally.

An African Council will be established to replace the present African Advisory Council (which will cease to exist). The composition of the African Council will be as follows: (a) the Resident Commissioner as President and not more than seven other official members; (b) the chiefs of the eight principal tribes as permanent *ex-officio* members; (c) thirty-two members appointed or elected from thirteen divisions in the Protectorate, who may either be appointed at meetings of the respective tribes assembled in *kgotla* or elected by tribal or district councils where these exist; (d) not more than two non-official members appointed by the Resident Commissioner.

The composition and method of selection of this council will be the same as for the present African Advisory Council. It is intended also that the elective principle should be applied more extensively in future as tribal and district councils are further developed.

One of the important functions of the African Council will be to act as an electoral college for the purpose of electing, from amongst its *ex-officio*, appointed or elected members, ten Africans to sit as members of the Legislative Council. In addition, provision will be made whereby the Resident Commissioner may consult the African Council on a range of matters affecting Africans only, such as matters affecting chiefs, African courts and customary law (Commonwealth Survey, C.O.I., October 11, 1960).

Bermuda

Colonial Report

The Reports for 1957 and 1958 have been published by the Colonial Office (H.M.S.O. 58–1–6–58).

British Honduras

Additional Instructions

Additional Instructions, dated October 26, 1960, issued to the Governor of British Honduras, replaced clause 14 of the British Honduras Royal Instructions, 1954, regulating the prerogative of pardon in capital cases, and amended clause 15.

Colonial Report

The Report for 1958 has been published by the Colonial Office (H.M.S.O. 58–1–8–58).

Letters Patent

The British Honduras Letters Patent, 1960, dated October 26, 1960, revokes existing Letters Patent.

British Solomon Islands

New Constitution

On October 18 a new constitution, providing for the setting up of a Legislative Council and an Executive Council in place of the existing Advisory Council, came into operation in the British Solomon Islands Protectorate.

The Legislative Council will have a small official majority, and will consist of three *ex-officio* members, eight official members and ten unofficial members. It will be presided over by the High Commissioner for the western Pacific, whose headquarters are in Honiara, the capital of the Protectorate, and both the official members and the unofficial members will be appointed by the High Commissioner. The unofficials will consist of six Solomon Islanders and four Europeans.

The Executive Council will have four Government members and four unofficial members, two of whom will be Solomon Islanders and two Europeans.

It is expected that the new Legislative Council will hold its first meeting in December 1960, and thereafter will normally meet twice a year. The Executive Council is expected to meet for the first time in November, after which it will meet as and when required.

Before the introduction of the present constitution, the Protectorate was administered directly by the High Commissioner for the Western Pacific, with

the help of an Advisory Council consisting of official and non-official members, including Solomon Islanders (Commonwealth Survey, C.O.I., November 8, 1960).

Cameroons

Political Future

Talks were held in November between the United Kingdom Secretary of State for the Colonies and an all-party delegation from the Southern Cameroons.

The General Assembly of the United Nations decided in 1959 that the two questions in the plebiscite to be held in the Southern Cameroons on February 11, 1961, are to be:

1. Do you wish to attain independence by joining the independent Federation of Nigeria? or
2. Do you wish to attain independence by joining the independent Republic of the Cameroun?

The Trusteeship Council has asked the Administering Authority to take steps, in consultation with the authorities concerned, to ensure that the people of the territory are fully informed, before the plebiscites, of the constitutional arrangements that would have to be made at the appropriate time for the implementation of the decisions at the plebiscite.

The implications of joining the Federation of Nigeria have already been made clear, namely, that the Southern Cameroons would become a separate Region in the Federation. The main matter discussed at the talks was the implications of the second choice.

The talks revealed that there were considerable differences of view on this subject.

The Secretary of State said that, in the view of the United Kingdom Government, the United Nations, in adopting the two alternatives of joining Nigeria or joining the Cameroun Republic, clearly ruled out a period of continuing trusteeship or separate independence for the Southern Cameroons. In the United Kingdom Government's view, therefore, if the plebiscite goes in favour of the Cameroun Republic, arrangements would have to be made for the early termination of trusteeship and the transfer of sovereignty to the Republic. The Secretary of State had noted that the Premier of the Southern Cameroons had ascertained from the President of the Cameroun Republic that a federal form of constitution would be acceptable.

In the Secretary of State's view the following interpretation would be consistent with the second question:

"A vote for attaining independence by joining the Republic would mean that, by an early date to be decided by the United Nations after consultation with the Governments of the Southern Cameroons, the Cameroun Republic and the United Kingdom as Administering Authority, the Southern Cameroons and the Cameroun Republic would unite in a Federal United Cameroun Republic. The arrangements would be worked out after the plebiscite by a conference consisting of representative delegations of equal status from the Republic and the Southern Cameroons. The United Nations and the United Kingdom would also be associated with this conference. During the short period while the arrangements for transfer were being made, the United Kingdom would of course be ready to continue to fulfil their responsibilities under the Trusteeship Agreement."

Mr. Foncha, the Premier of the Southern Cameroons, expressed the hope that the United Nations would be prepared, if the vote went in favour of the Cameroun Republic, to agree to a period of independence for the Southern Cameroons during which preparations would be made for the unification of the Southern Cameroons with the Cameroun Republic on a federal basis. He recognised that this interpretation would require the specific

endorsement of the United Nations. In Mr. Foncha's view the arrangements for unification should follow the broad lines of the agreement he had reached with President Ahidjo of Cameroun.

The delegates representing the Opposition party in the Southern Cameroons Legislature took broadly the same view as the United Kingdom Government. They held that the people of the Southern Cameroons should be told plainly that, if they voted to join the Cameroun Republic, this would happen within a short time. They also expressed the strong view that precision should be given before the plebiscite to the arrangements for joining the Cameroun Republic.

All delegates agreed that, subject to the concurrence of the President of the Cameroun Republic and in the absence of a new definition by the United Nations of the meaning of the second question, the formula put forward by the Secretary of State and quoted above would be acceptable to them.

In view, however, of the differences of interpretation of the meaning of the second question, the delegates considered that the United Nations should be apprised of the differing viewpoints and asked to give an authoritative ruling as soon as possible (Commonwealth Survey, C.O.I., December 6, 1960).

Cyprus

British Nationality

The British Nationality (Cyprus) Order, 1960, has been made.

Articles 1 and 2 of this Order, which is made under section 4 of the Cyprus Act, 1960, specify the persons who are to cease to be citizens of the United Kingdom and Colonies under section 4 (1) of the Act in accordance with the agreement for the establishment of the Republic of Cyprus.

Article 3 relates to the re-acquisition of citizenship of the United Kingdom and Colonies lost, by virtue of the Order, under section 4 (1) of the Act. Section 6 of the British Nationality Act, 1948, includes provisions enabling a citizen of a Commonwealth country to acquire citizenship of the United Kingdom and Colonies by registration. Section 4 (3) of the Cyprus Act provides that until February 16, 1963, certain persons who cease to be citizens of the United Kingdom and Colonies by virtue of the Order shall have the same rights as citizens of a Commonwealth country to apply for registration as citizens of the United Kingdom and Colonies under section 6 of the British Nationality Act; the persons who are to have this right are those persons to whom section 4 (3) of the Cyprus Act is applied by the Order. Article 3 applies section 4 (3) to those persons who cease to be citizens of the United Kingdom and Colonies automatically by virtue of Article 1 (S.I. 1960 No. 2215).

Ghana

Judicial Committee of the Privy Council

The Commonwealth Relations Office has published as a White Paper the exchange of letters between the Government of the United Kingdom and the Government of Ghana relative to the hearing by the Judicial Committee of appeals from courts of judges in Ghana the records of which have been registered in the Privy Council office before July 1, 1960 (Cmnd. 1190).

Gibraltar

Administration

On October 27, 1960, the Prime Minister, in a written answer, refused to put the administration of Gibraltar under the Commonwealth Relations Office (627 H.C. Deb. 296).

Kenya

Constitution

The Kenya (Constitution) (Amendment No. 2) Order in Council, 1960, amends the Kenya (Constitution) Order in Council, 1958, in order to establish a new Legislative Council for Kenya and by inserting provisions with respect to fundamental human rights. It also amends the Order of 1958 with respect to the composition of the Council of Ministers and makes certain minor or consequential amendments (S.I. 1960 No. 2201).

Malta

Blood Commission

On December 15, 1960, the Secretary of State for the Colonies, in a reply to an oral question, stated that he had received the report of the Blood Commission, appointed to formulate constitutional proposals for Malta and the report would be published early in 1961 (632 H.C. Deb. 570–571).

Magistrates

The Malta (Constitution) (Amendment) Order in Council, 1960, dated October 26, 1960, amends the Malta (Constitution) Order in Council, 1959, with regard to the appointment, removal and qualifications of magistrates of the inferior courts of Malta.

Nigeria

Independence

The Federation of Nigeria became a sovereign independent state, and a member of the Commonwealth, on October 1, 1960.

Membership of the United Nations

Nigeria's application for membership of the United Nations, which was sponsored by the United Kingdom, Ceylon and Tunisia, was approved unanimously by the Security Council on October 7, 1960. The same day the application was sponsored in the General Assembly by all ten member states of the Commonwealth and was approved by acclamation.

North Borneo

Boundaries

The North Borneo and Sarawak (Alteration of Boundaries) Order in Council, 1960, makes a small alteration in the boundary between the Colonies of North Borneo and Sarawak in the area east of Brunei Bay (S.I. 1960 No. 1962).

Papua and New Guinea

Constitutional Development

The native people of Papua and New Guinea will for the first time be given the right to elect members to the territory's Legislative Council under a bill brought before the Australian House of Representatives on September 22, 1960. The trust territory of New Guinea is administered by Australia under the United Nations trusteeship system and has been governed since 1947 in an administrative union with the neighbouring Australian territory of Papua. A Legislative Council for the two territories was established at Port Moresby in Papua in November 1951. [The western half of the island of New Guinea is under Netherlands rule; the Indonesians claim this territory, known to them as West Irian.]

The Bill provides for an increase in the number of members of the Legislative Council from twenty-nine to thirty-seven. The elected members will be increased from three to twelve, and six of these will be elected native members chosen by electoral conferences of delegates from local councils and groups of advanced natives. Appointed non-official members will be increased from nine to ten, and five of these will also be native members. While the present Legislative Council is composed of seventeen official and twelve non-official members (including three nominated native members), the new council will contain fifteen official and twenty-two non-official members. Total native representation will be raised from three to eleven. The Administrator will be instructed to nominate at least two native members for the people in the backward areas who are unable to take part in the elections at this stage. The elections under the new system are expected to be held in February or March 1961.

The present Executive Council, which assists the Administrator and is composed entirely of official members, will be abolished. A new Administrator's Council will be established, which will comprise the Administrator, three official members and three other members of the Legislative Council, of whom at least two will be elected members. Since only legislative councillors will be eligible for membership of the new Administrator's Council, the new body will introduce the "first measure of representative government to the territory."

Mr. Hasluck, the Australian Minister for Territories, described the Bill as an early but important stage in the advance of the territory towards self-government. The Government saw a single future for all inhabitants of the territory. For the time being, there would be separate electoral systems for Europeans and natives, but it was hoped to introduce a common electoral roll at the second stage of constitutional development, possibly in five or six years' time (Commonwealth Survey, C.O.I., November 22, 1960).

Rhodesia and Nyasaland

Advisory Commission

The Report of the Advisory Commission on the review of the constitution of Rhodesia and Nyasaland (with Appendices I to V) has been published (Cmnd. 1148). With the Report were published two reports of a committee of officials, one giving a survey of developments in the Federation since it was established in 1953 (Cmnd. 1149), and the other dealing with possible constitutional changes (Cmnd. 1150). Also published are five volumes of evidence submitted to the Commission (Cmnd. 1151, 1151–I, 1151–II, 1151–III, 1151–IV).

Of the twenty-five members of the commission—there were twenty-six until Lord Shawcross resigned through ill-health—twenty-three signed the report, but of these fifteen have appended reservations on various sections. Two members of the commission, Mr. H. G. Habanyama, chief councillor of the Gwembe Tonga native authority in Northern Rhodesia, and Mr. Wellington Chirwa, a Nyasaland representative who was formerly an African member of the Federal Parliament, dissented and signed a minority report.

The terms of reference of the commission were "to advise the five Governments, in preparation for the 1960 review, on the constitutional programme and framework best suited to the achievement of the objects contained in the constitution of the Federation of Rhodesia and Nyasaland of 1953, including the preamble." The chairman was Lord Monckton of Brenchley, and the commission contained representatives from the United Kingdom, Australia, Canada and all the territories in the Federation.

The commission received over a thousand written memoranda and heard oral evidence from about 750 witnesses or groups of witnesses. "There is no question," states the report, "that many more witnesses would have come

forward in Northern Rhodesia and Nyasaland to give evidence had it not been for the boycott of the commission, organised by the United National Independence Party and the African National Congress Party in Northern Rhodesia, and the Malawi National Congress in Nyasaland, and the intimidation with which these boycotts were enforced." Evidence received during the commission's tours of Northern Rhodesia and Nyasaland convinced them that intimidation and violence had been organised on a considerable scale by Nationalist parties against their political opponents, and even against those who failed to give them their active support, with the general aim of stifling the expression of moderate pro-Federal opinion. "In Nyasaland intimidation had gone far to undermine the authority of the Government, and in some places had seriously threatened the maintenance of law and order. There is danger of its having the same effect in parts of Northern Rhodesia. Whatever changes may be agreed by the Review Conference, nothing will be achieved unless intimidation and violence are effectively stamped out."

However, in spite of the effects this had on the free expression of opinion, the commission were left in no doubt that genuine opposition to Federation on the part of Africans in the Northern Territories was "widespread, sincere and of long standing. It is almost pathological." It was expressed by the moderate Africans who gave evidence as well as by the nationalist parties who organised the boycotts but who gave their views in public. The opposition had grown more intense during the past seven years. In 1953 only five countries in Africa enjoyed the status of an independent nation. By the end of 1960 these would have been joined by over twenty others, and this had had a powerful effect on the peoples of the Federation. "It is inevitable and natural that the prospect of independence, seven years ago unthinkably remote, should now appear to many Africans to be a right from which they should be no longer debarred; and racial feeling, far from having merged into a sense of multi-racial nationhood, has grown sharper and stronger.

"It now appears to many Africans that only the presence of the European community politically entrenched behind the Federal constitution stands between them and the form of freedom already granted to their fellow Africans in most other parts of the continent. So long as Federation seems to them to block their way to rapid political progress, so long will their hostility to it continue to grow."

Repeatedly the commission were told that one reason for African distrust of Federation was the failure of the administrations in Northern Rhodesia and Nyasaland to commend it to Africans who naturally looked to them for guidance. "Equally important," they say, "has been the failure to take any immediate, significant and well-publicised steps to demonstrate the reality of racial partnership as the basis of Federation. There is no doubt that racial discrimination, although it exists in some degree all through the Federation, is felt to be particularly galling in Southern Rhodesia.

"Sincere efforts have been made, especially in the last few years, to remove the colour bar, but it still operates, and presses hardest on those naturally most sensitive to it, namely, members of the emerging professional and middle classes. It exists in Southern Rhodesia to a degree that causes such offence as to make association with Southern Rhodesia appear insupportable to Africans in the Northern Territories." Partnership, in the Africans' view, had been a sham. The constitutional forms of Federation had given them a meagre part to play and had not provided sufficient protection for their interests, and rule from Salisbury was distrusted as too much influenced by European interests and by the native policies of Southern Rhodesia.

"The opposition to Federation, in part emotional and blind, has indeed become so strong that, however radical might be the changes in form and outlook, the retention of the name 'Federation,' which has become a hated word and is associated in their minds with a policy of white domination, will cause opposition to linger on. In our view, it should be changed."

The commission conclude: "Although the weight of opinion among Europeans in all three territories, and among Africans in Southern Rhodesia, is for Federation to continue, the strength of African opposition in the Northern Territories is such that Federation cannot, in our view, be maintained in its present form."

The commission remark that seven years have seen a remarkable, if perhaps uneven, economic advance. Taking capital investment as one yardstick, they say that in the five years from 1954 no less than £805 million was invested in the Federation, of which £581 million came from domestic savings and £224 million from overseas. They state that to attract investment at the rate of over £160 million a year argues a high degree of public confidence in a healthy and expanding economy. Other yardsticks are to be found in the national income which has risen from £303 million in 1954 to £440 million in 1959; in the total of wages and salaries which has increased from £141 million to £232 million; and in the figures of exports which in the six years before Federation increased in volume by 56 per cent. and in the six years after by 74 per cent. An outstanding economic achievement is the building of the Kariba Dam.

But perhaps the greatest benefit Federation has achieved is the superior credit-worthiness of the area.

Nyasaland, the commission point out, has most to lose if the Federation were to break up. In 1959 the gross domestic product there was £19 a head, in Northern Rhodesia it was £82 and in Southern Rhodesia £89. Between 160,000 and 200,000 Nyasas out of about 750,000 adult males are at any given time employed outside Nyasaland, and at one time or another in his life almost every male Nyasa has to seek work outside his territory. Nyasaland takes out of the general revenue of the Federal area about £3·5 million more each year than it puts in, and the gap between its needs and its income is likely to widen as demands for social services increase. Secession would clearly plunge the country into a deeper pit of poverty than before.

The commission's brief review supports their contention that the economies of the three territories supplement each other.

If the Federation broke up, the pursuit of divergent political or economic policies might cause serious friction between the three territories. But the main danger, as the commission sees it, is a more far-reaching one. They state: "It was an express intention of Federation to build up a partnership between the races. Although it is clear from the criticisms we have heard that much remains to be done, some progress has already been made. A dissolution would gravely prejudice the attainment of this aim. . . . The immediate reaction to the dissolution of the Federation, both inside and outside the area, would be that a great experiment in race relations had failed. This experiment is being watched with close interest throughout the world. If it could be made to succeed it could have a profound effect upon developments, not only in the territories themselves, but in the rest of Africa. . . . To break it up at this crucial moment in the history of Africa would, we believe, amount to an admission that there is now no hope of survival for any multi-racial society on the African continent and that differences of colour and race are irreconcilable."

The commission emphasise their conviction that if some federal form of association is to continue, Africans must in the immediate future have a much higher proportion of the seats in the Federal Assembly. The Federal Assembly should not be reduced in size, but the commission could not agree on the principles which should govern the proportion of seats to be allocated to Africans and Europeans. The majority consider the only basis for division fair to both Europeans and Africans and the one having the best chance of securing agreement among the two principal communities is parity between them, with an equal number of seats for Europeans and Africans. The largest group "think that it is essential for the continuance of the Federation

that parity be introduced now," while others, who support parity as an aim, think it should be approached gradually.

On the method of election the commission consider that the franchise should remain qualitative, although they are anxious to ensure that Africans with experience and judgment should be included, even if they do not possess education or income qualifications. The common roll is preferred, providing measures are taken to ensure members are sufficiently representative of their own racial community. It is suggested that there should be ten Africans from each territory, and that of the European seats, seventeen should be held by Southern Rhodesia, ten by Northern Rhodesia and three by Nyasaland. The majority recommend that a committee should be appointed to settle details of the franchise, but suggest that apart from the basic qualifications of citizenship, age and residence, there should be no basic literacy test.

The commission call upon the Government to declare as soon as possible that further constitutional advance towards self-government will be made in Northern Rhodesia, and suggest that a conference, similar to that held recently on the Nyasaland constitution, should be held without delay to work out the nature and timing of the necessary changes. They recommend that a new constitution for Northern Rhodesia, and such constitutional changes as may be desirable in Southern Rhodesia, should be negotiated and put into effect without awaiting the full revision of the Federal structure.

Most of the members recommend that Northern Rhodesia should have an African majority in the legislature and an unofficial majority in the Executive Council, but some consider the time has not yet come for an African majority in the Legislative Council, while others feel that there should be an African majority in both. If the franchise is not lowered sufficiently to bring a reasonable number of voters on to the roll in any area, consideration should be given to reserving special seats for the tribal authorities. It is emphasised that nothing should be done to diminish the traditional respect for the tribal chiefs.

The next aspect of the commission's new design relates to the allocation of functions between the different governments. The commission recommend firstly that no subject should be divided between the Governments on a racial basis, and secondly, that matters affecting the day-to-day life of the inhabitants should be a territorial responsibility. External affairs (including trade relations), defence and the development and control of the economy must be the responsibility of the Federal Government. The Federal Government should have the means to regulate the economy of the Federal area, and taxation should be regarded as an essential instrument of its control. Non-African education, roads and prisons should become territorial subjects and, the report continues, the majority also recommended that health and non-African agriculture should become territorial responsibilities. Nine members of the commission believe, however, that non-African agriculture in Northern and Southern Rhodesia should remain a Federal responsibility, and other members also have reservations on the responsibility for health.

The commission made certain proposals on the subject of taxation and fiscal arrangements and on machinery for co-operation between Governments.

The commission attach great importance to the removal of racial discrimination and to the development of a genuine partnership between the different races. They give this warning: "To say that events are moving fast in Africa is a truism. They are moving like an avalanche, and it appears only too likely that those who merely cling to their familiar positions will be swept away. We strongly urge, therefore, that if it is the genuine desire of the Europeans of Southern Rhodesia to preserve an association with their neighbours in the north they should remove as quickly as possible from their laws and practices all instances of unfair racial discrimination."

The "unfairly discriminatory laws and practices" which the commission consider should be removed or radically reformed include the Pass Laws in Southern Rhodesia, the Southern Rhodesia Land Apportionment Act, which

reserves for the sole use of Europeans some 48 million acres of land and prevents Africans from occupying plots in the main towns, and " relatively minor, if irritating, matters such as restrictions on the use by Africans of cinemas, hotels, bars, restaurants, cafes, and public lavatories and on their buying certain types of liquor."

On the credit side the commission note that much progress has recently been made, for example in the establishment of non-racial trade unions, and that a number of irritations, such as restrictions on betting and buying alcoholic liquor, have been removed. Nonetheless, the commission recommend that " Governments should remove as quickly as possible all the unfairly discriminatory practices which remain, in order not only to eliminate grievances but to give a positive impetus to the development of partnership." In the field of social, economic and commercial practice the commission consider " it is both possible and indeed desirable for Governments to legislate to make unfairly discriminatory practices, except in the sphere of purely private relationship, illegal."

The Commission consider the parliamentary government on the Westminster model, as it exists in the older Commonwealth Federations, will not by itself meet the special needs of the Federation of Rhodesia and Nyasaland. Africans do not trust the legislatures of the present, Europeans have grave doubts about the legislatures of the future. New or more effective safeguards should be provided and fundamental human rights guaranteed. To safeguard individual and collective rights, the commission propose that a Bill of Rights should be included in the constitutions of the Federation and of the territories, and that Councils of State should be set up " to protect persons against the enactment of legislation unfairly discriminatory on grounds of race, colour or creed." The Bill of Rights would, they envisage, be " drawn up in accordance with the traditions of the English-speaking world, and the current practice of the multi-racial Commonwealth," and would be enforced by the courts, with a right of appeal to the Judicial Committee of the Privy Council.

Separate Councils of State, modelled on the Kenya Council of State, should be set up for the Federation and each of the three territories, with members selected on grounds of personal eminence, experience and detachment, " to act as wise and impartial men and not as representatives of races or territories." It is considered that the functions of these bodies should be to consider proposed substantive legislation and, if this was found to be unfairly discriminatory, to report accordingly to the legislature; to consider existing legislation and subsidiary legislation and, if found to be unfairly discriminatory, to report accordingly to the Government and the legislature; and to acquaint themselves with any unfairly discriminatory trends and report on them without dealing directly with individual complaints.

" We wish to emphasise the importance we attach to the Bill of Rights and the Councils of State being regarded not as temporary but as permanent features of the Federal and Territorial Constitutions," state the commission. " We trust that Her Majesty's Government will ensure that these two safeguards and the manner of their entrenchment will be retained in the constitutional instruments agreed upon at the time a territory achieves self-government or, if it wishes to secede, at the time of its secession."

Among other reforms proposed is the abolition of the term " Federation." So strong is African opposition in the Northern Territories to Federation in its present form, the report states, that the very word has become a term of abuse. " We are convinced that the term ' Federation ' has in itself become a serious political liability, and that the federal association in its new form must start with a new name." Suggestions are made for an alternative name, but, it is concluded, the Governments themselves should choose the new name.

It is recommended that Salisbury should remain the administrative capital for the present, but that the Federal legislature should meet in each of the three territories in turn, the first two meetings after the Review Conference

being in Lusaka and Zomba. If in two or three years' time the removal of racial discrimination has made Salisbury acceptable to the Africans as a capital, this arrangement could be reconsidered.

Dealing with the need for effective public services, the commission consider that the rising temper of nationalism in Africa demands an intensification of effort in training local men to assume higher responsibilities in every field of government and ask that the Governments should give urgent consideration to establishing special institutions for training civil servants of all races, while continuing to send selected students for training overseas.

The commission find nothing in constitutional theory which makes the right of secession incompatible with the federal concept. "It is said by some writers," they say, "that the existence of such a right is difficult to reconcile with good or strong Federal Government, but the expediency of a provision for secession in any particular case must depend upon the circumstances that led to Federation. Given proper safeguards for determining the desires of the inhabitants of a territory contemplating secession and for preserving the interests of the remainder of the Federation (for instance, in the maintenance of services which ought obviously to be jointly operated, or in financial or customs matters) a right of secession may provide a valuable safety valve."

Because of the importance of the question of secession in the minds of many Africans, the commission think it should be made clear before the Review Conference that this subject will be discussed there: "This would no doubt affect the attitude of Africans towards the conference."

The commission indicate their reluctance to talk of secession, yet they say they would be failing in their duty if they did not deal with the question. If the United Kingdom Government were to declare the Federation indissoluble, as in the case of the Commonwealth of Australia, this might remove uncertainty and promote external confidence, assuming the internal stability could also be maintained. However, it is the commission's view that "no such assumption is justified." On the contrary, this course would be seen again to involve the imposition of Federation—this time as a permanency—without regard to the wishes of the inhabitants. In the prevailing atmosphere in the northern territories they believe that such a declaration would give rise immediately to serious political disturbances which would soon destroy any external confidence created by the declaration itself.

On the other hand, they consider that a declaration of the intention of the United Kingdom Government to permit secession by any of the territories, if so requested after a stated time or at a particular stage of constitutional development, would have a very favourable effect and might be decisive in securing a fair trial for the new association.

On the question of the time at which the United Kingdom Government might consider a request from a territory to secede, the commissioners had differing views. "Some of us think that a reasonable period would be seven years. This period is based on the assumption that it might take between four and five years from now for the Northern Territories to reach the stage of responsible government. . . . Others, however, consider that feelings on this subject in the Federation are such that it would not be possible to prescribe a period of more than five years; such a period would, for example, take account of the wishes both of chiefs and native authorities to remain under British protection, and also of political parties to reach the stage of responsible government, coupled with a right to secede, as soon as possible. Others, again, consider that a rather longer period than seven years should be laid down.

"If, on the other hand, the timing of a request to secede were linked to a stage of constitutional advance in a territory, we think that the stage at which it would be reasonable to permit a territory the right to request secession would be when it attains self-government."

How should a territory's wish to secede be established? Here the commission were divided. The majority report states: "Since it is impossible to foresee the exact conditions which would prevail at the time and also because the entire legal responsibility in this matter rests with Her Majesty's Government (in the United Kingdom), the majority of us have concluded that it would be better to provide that the manner in which the wishes of the inhabitants should be ascertained should be determined entirely by Her Majesty's Government at the time. We have no doubt that Her Majesty's Government would impose strict conditions to ensure that the genuine wishes of the inhabitants were fully ascertained and that the issues were fully explained in an atmosphere free from intimidation."

The commission put forward two alternative formulae which they suggest the United Kingdom Government might use as a basis for a declaration about secession. It would be for the Review Conference to advise which should be adopted. The majority of the commission considered that the appropriate way of making such a declaration of intention would be by amending the preamble to the constitution to include an appropriate reference to it.

In some respects the Federation remains subordinate to the United Kingdom Government and to Parliament at Westminster. Having considered these "elements of subordination," the commission recommend that the Governor-General should not be appointed on the advice of Federal Ministers until the Federation attains full independence within the Commonwealth. They recommend that the right of appeal by special leave to the Privy Council should be entrenched in the new constitution, especially in view of their recommendations concerning the introduction of a Bill of Rights. Even when the Federation attains full independence within the Commonwealth there is no reason, they say, why appeals should not continue to lie to the Judicial Committee of the Privy Council.

Another recommendation is that effect should now be given, by Act of the United Kingdom Parliament, to the United Kingdom Government's agreement in 1957 that the Federal Government should be given power to legislate with extraterritorial effect.

Provided that their recommendations on safeguards are accepted and entrenched in the constitution, the commission recommend that the Governor-General should no longer be required to reserve for the signification of Her Majesty's pleasure any Bill within the competence of the Federal Legislature; but as an interim measure he should still be required to reserve any Bill relating to the amendment of the constitution itself. A majority consider that, on the same conditions, Her Majesty's power of disallowance of laws should be removed from the constitution.

"Looking to the future," the commission conclude, "we believe that in terms of the preamble to the 1953 constitution, the Federation can only go ahead to its final goal of full independence within the Commonwealth at the stage when all three territories have achieved full self-government in the territorial sphere. The period in which this might happen is related to our recommendations on the question of secession. If Her Majesty's Government decide to make a declaration of intention to entertain requests for secession from all three territories when a fixed period of years has elapsed from the inception of the new constitution, the same period might be adopted as the minimum to be allowed to elapse before all three territories can be granted full self-government. If, on the other hand, the right of a territory to request secession is linked to its attainment of self-government . . . it might be agreed that when all three territories have reached that stage, and have decided not to request secession, Her Majesty's Government would at that time consider granting to the Federation independent status within the Commonwealth."

Mr. Wellington Chirwa and Mr. Habanyama publish a minority report, proposing the immediate dissolution of the federation. They suggest that a referendum should be held in all three territories, on the basis of universal

adult suffrage, to decide on federation or secession. They make various suggestions for the future economic association of the three territories and they urge the United Kingdom Government to accelerate the rate of constitutional advance in the northern territories.

In a broadcast made at the time of the publication of the commission's report Sir Roy Welensky, the Prime Minister of the Federation of Rhodesia and Nyasaland, referred to the statements which he had made in public that the terms of reference of the commission excluded any consideration of the break-up of the Federation or the right of any territory to secede. He said: "Although they must have been aware of my statements, the Monckton Commission have seen fit to recommend that provision should be made in the revised constitution that in certain circumstances each of the territories should have the right to secede from the Federation. This recommendation is in direct conflict with assurances given to me and my Government, and by myself to the people of the Federation."

Sir Roy Welensky then went on to recall that the possibility of including a secession clause in the constitution had been considered and rejected at the pre-federation conferences of 1952 and 1953 and that the United Kingdom Government had rejected secession at the time of the 1957 Agreement. In 1959 he had sought and received from Mr. Macmillan assurances that secession was not for consideration by the commission. For the reasons he had given he was compelled utterly to reject the commission's recommendation and he must hold the United Kingdom Government to Mr. Macmillan's undertaking to stand by the terms of reference as had been agreed between them. He said: "I am taking this stand not only because honour is at stake —though this would be a sufficient reason—but also because there are fundamental principles involved.

"I will not dwell on the gross discourtesy to myself and Mr. Macmillan by the commission in recommending that in certain circumstances each territory should have a right to secede, in the teeth of our clear indications to them and to the public at large of our opinion that secession was not within their terms of reference. I must assume that the commission came bona fide to a different view of their terms."

Sir Roy Welensky said that the commission had not obtained either from governments or from witnesses their views as to the likely effect of such a recommendation on secession or on the question of secession generally. He would not at this time argue the demerits of the proposal—the economic consequences would be particularly calamitous—but his party believed that to provide for the right of a territory to secede from the Federation under any conditions would be to sound the death knell of the Federation.

A statement by the United Kingdom Government was issued by the Commonwealth Relations Office on October 11. This referred to the fact that the Prime Minister of the Federation of Rhodesia and Nyasaland had expressed his view that the Monckton Commission's recommendations in Chapter 16 of their report go beyond their terms of reference.

"The terms of reference of the commission, as agreed between the Governments, were not intended to embrace the question of the dissolution of the Federation, or the secession of any of the component Territories. The United Kingdom Government made it clear that they were willing to extend the terms of reference so as to cover this, since they considered that it would not be in accord with the accepted objects of the Federal Constitutional Review. This was made clear by the British Prime Minister in the House of Commons. The Federal Prime Minister was therefore justified in assuming that, in view of these terms of reference, the commission would not recommend secession or the dissolution of the Federation.

"The commission have in fact recommended that the Territories should be given a qualified option to secede in certain defined circumstances at some future date. However, they have not recommended the dissolution of the

Federation nor that any of the Territories should secede. Their report strongly stresses the advantages of maintaining a federal association, and examines a number of methods of making this more generally acceptable. It is in this context and with this purpose that the commission have made their recommendation.

"Whatever view may be taken as to whether this recommendation was within the terms of reference of the commission, it is clear that the Review Conference must be free to discuss this and any other relevant issue."

In a speech after the Conservative Party conference at Scarborough on October 15, Mr. Macmillan referred to the work of the Monckton Commission. He said: "It will, of course, be for the Federal Review Conference to discuss and decide these great matters. I would only say this: the purpose of the Monckton Commission was to help us not to destroy but to confirm and develop the Federal association between the three Territories of Central Africa.

"And the remarkable and outstanding feature of the commission's report is the nearly unanimous acceptance of the need for such a Federation and the tragedy that would be involved in its collapse.

"The Government, therefore, will approach the review with the earnest hope that the conference will find an agreed basis for the continuance of a Federal structure and with the determination to carry out to the full our responsibilities and our pledges towards all men of all races" (Commonwealth Survey, C.O.I., October 25, 1960). On November 16, 1960, the House of Lords debated the Monckton Commission Report (226 H.L. Deb. 559–660).

Federal Constitutional Review Conference

The Federal Constitutional Review Conference opened in London on December 5, 1960, and after eleven meetings, adjourned on December 17. It will reconvene on a date in 1961 to be decided by the five Governments in the light of the progress made at the talks on the constitutions of Southern Rhodesia and Northern Rhodesia. Delegations at the Conference represented the Governments of the United Kingdom, the Federation of Rhodesia and Nyasaland, and its three constituent territories, Southern Rhodesia, Northern Rhodesia and Nyasaland.

The United Kingdom delegation to the conference consisted of the Prime Minister, the Secretary of State for Commonwealth Relations, the Secretary of State for the Colonies, the Minister of State for Colonial Affairs, and the Minister of State for Commonwealth Relations (Commonwealth Survey, C.O.I., December 20, 1960; see also 632 H.C. Deb. 214–216, December 13, 1960, and 632 H.C. Deb. 1063–1065, December 20, 1960).

Northern Rhodesia

Colonial Report. The Report for 1959 has been published by the Colonial Office (H.M.S.O. 58–1–31–59).

Constitutional Conference. The Conference met in London on December 19 and 20, 1960, with the Secretary of State for the Colonies in the chair.

After an opening address by the Secretary of State for the Colonies, to which the Governor of Northern Rhodesia (Sir Evelyn Hone) replied, statements were made to the Conference by Mr. H. J. Roberts, Minister of Labour and Mines; by Chief Mapanza; by Mr. K. D. Kaunda, United National Independent Party; by Sir John Moffat, Liberal Party; by Mr. H. M. Nkumbula, African National Congress; and by Dr. G. A. Smith, Dominion Party.

Following these statements a general discussion was initiated, and the Conference agreed to resume its deliberations towards the end of January at a date to be fixed by the Secretary of State, when it will turn to detailed consideration of the constitutional arrangements for Northern Rhodesia.

Nyasaland

Colonial Report. The Report for 1959 has been published by the Colonial Office (H.M.S.O. 58–1–32–59).

Electoral Provisions. The Nyasaland (Electoral Provisions) Order in Council, 1960, enables the Governor of Nyasaland to make provision for the election of members to a new Legislative Council that it is proposed should hereafter be established for Nyasaland in accordance with the recommendations of the Nyasaland Constitutional Conference held in London in July and August, 1960, and permits registration of voters to take place and other preliminary measures to be taken in pursuance of any such provision (S.I. 1960 No. 2210).

Southern Rhodesia

Constitutional Conference. The Conference met in London on December 16 and 17, 1960, and discussed matters of procedure, after which it adjourned. Its meetings will be resumed in January in Southern Rhodesia (632 H.C. Deb. 1303–1305).

Seychelles

Constitution

On October 25, 1960, in a written answer, the Secretary of State for the Colonies referred to the despatch from the Governor of the Seychelles published in November 1959 and setting out his proposals for the present constitution. The Secretary of State for the Colonies stated that he agreed with the Governor that the constitution would be well suited to the needs of the Colony until such time as there should appear to be any widely supported and real desire for elected representatives to share the responsibilities of government and to take a direct part in its day-to-day administration (627 H.C. Deb. 254).

Sierra Leone

Constitution

The Sierra Leone (Constitution) (Amendment) (No. 2) Order in Council, 1960, amends the Sierra Leone (Constitution) Order in Council, 1958, by establishing a Judicial Service Commission and by substituting a new Public Service Commission for the existing Public Service Commission. It also provides for the establishment of the office of Director of Audit and the office of Director of Public Prosecutions and amends the provisions relating to the office of Attorney-General. Further, the Order contains provisions relating to the grant of pensions (S.I. 1960 No. 1960).

Additional Instructions, dated October 26, 1960, replace clause 4 of the principal Instructions, dated August 11, 1958.

Letters Patent

The Sierra Leone Colony Letters Patent (No. 2), 1960, dated October 26, 1960, amend Articles in the Sierra Leone Colony Letters Patent, 1951–1960.

Protectorate

The Sierra Leone Protectorate (Amendment) (No. 2) Order in Council, 1960, revokes sections 8 and 9, which relate to the appointment, etc., of officers and discipline, of the Sierra Leone Protectorate Order in Council, 1951 (S.I. 1960 No. 1959).

Somaliland

Colonial Report

The Reports for 1958 and 1959 have been published (H.M.S.O. 58–1–40–59).

South Africa

Debate

On December 15, 1960, a motion in the House of Commons calling upon the Government to take action to ensure that the Government of South Africa carried out the obligations it undertook in accepting the mandate for South-West Africa or surrender it to the United Nations so that alternative trusteeship arrangements could be made was agreed to without a division (632 H.C. Deb. 671–729).

Referendum on Republic

The referendum to decide whether South Africa should become a republic was held in the Union and in South-West Africa on October 5. The total number voting was 1,633,272, which represents 90·7 per cent. of the electorate. 849,958 of the valid votes were in favour of a republic and 775,878 against, the republican majority being 74,080.

In a broadcast after the referendum, Dr. Verwoerd, the Union Prime Minister, indicated that the South African Parliament might decide that May 31, 1961—Union Day—might be a suitable date for the inauguration of the republic. He said that a draft constitution based on the existing constitutional legislation would be published as soon as possible. After acceptance in principle by the House of Assembly it would be sent to a joint select committee of both Houses of Parliament.

The Commonwealth Prime Ministers, at their meeting in May, suggested that " in the event of South Africa deciding to become a republic, and if the desire was subsequently expressed to remain a member of the Commonwealth," the South African Government " should then ask for the consent of the other Commonwealth Governments either at a meeting of Commonwealth Prime Ministers, or, if this were not practicable, by correspondence."

Tanganyika

Constitutional Conference

It was announced by the Governor of Tanganyika at the opening session of the new Legislative Council on October 11, 1960, that a constitutional conference would be held in March 1961.

The purpose of the conference will be: to advise the United Kingdom Secretary of State for the Colonies on the arrangements which need to be made for the attainment of self-government; to consider the steps which will have to be taken to prepare the way for independence and the termination of the United Nations trusteeship agreement; to devise the most effective way of taking those steps; and to work out, in consultation with the Secretary of State, an agreed programme for these final stages of constitutional development.

News of the decision to hold a conference follows very closely on the introduction of Tanganyika's latest stage of constitutional advance, in which responsible government has been granted over a considerable area of internal affairs. The territory now has a predominantly elected legislature and, for the first time, a Chief Minister and a majority of ministers appointed from the political party (the Tanganyika African National Union) which was successful in the elections.

On December 30, 1960, it was announced that the conference would be held in Dar-es-Salaam rather than in London as originally planned.

Legislative Council

The East Africa (High Commission) (Amendment) Order in Council, 1960, amends the provisions of the East Africa (High Commission) Order in

Council, 1947, relating to the period of the tenure of office of Unofficial Members elected by the Legislative Council of Tanganyika and also makes other minor amendments (S.I. 1960 No. 1965).

Trinidad and Tobago

Electoral Provisions

The Trinidad and Tobago (Electoral Provisions) Order in Council, 1960, enables the existing legislature of the Territory of Trinidad and Tobago to make provision for the election of members to a new House of Representatives which it is proposed should be established for the Territory. The Order also establishes a Boundaries Commission for the purpose of delimiting the electoral districts for the return of members to the proposed House of Representatives (S.I. 1960 No. 1961).

Uganda

Buganda Constitution

On October 17, 1960, the Secretary of State for the Colonies issued a statement that he had reaffirmed in his talks with the Kabaka of Buganda that elections should be held throughout Uganda early in 1961 for members of the new Legislative Council and that registration should begin in Buganda on August 22, 1960. He had explained to the Kabaka that he was not prepared to discuss matters reserved for consideration by the Relationships Commission, and in consequence he was unable to prejudge the advice of the Commission by making a declaration that the future constitution of Buganda would be federal in character. The constitutional arrangements to come into force after the elections early in 1961 would not in any way prejudice Buganda's position under its agreements with Her Majesty's Government. The Government has already made clear that there can be no question of secession of any part of the Protectorate so long as Her Majesty's Government is the protecting power. (See the Secretary of State's written answer on October 27, 1960; 627 H.C. Deb. 298–300.)

The Secretary of State agreed on December 17, 1960, to consider with the Governor of Uganda early in January 1961 the possibility of reopening discussions.

In Katikiro of Buganda *v.* Att.-Gen. (November 24, 1960) the Judicial Committee (Lords Morton, Keith, Denning, Hodson, and Mr. de Silva) *held,* dismissing an appeal by the Katikiro of Buganda from a judgment and order of the Court of Appeal for Eastern Africa, refusing declarations (1) that the Legislative Council of the Uganda Protectorate as at present constituted is not the Legislative Council referred to in the Second Schedule to the Buganda Agreement, 1955, (2) that the Katikiro is not bound or entitled to take the steps laid down in the Schedule for the purpose of electing representative members to represent Buganda in the Legislative Council of Uganda as at present constituted, and (3) that unless and until the Legislative Council is reconstituted so as to be the same as such Legislative Council there is no procedure for electing representative members, *held,* that the changes made by the Royal Instructions of December 1957 were neither fundamental nor major. See also *The Times,* November 25, 1960.

Relationships Commission

It was announced by the Colonial Office on November 24, 1960, that the Earl of Munster, a former Under-Secretary of State for the Colonies, had accepted an invitation to be chairman of the Relationships Commission which is to report on the future form of government best suited to self-governing Uganda and on the relationship of the various parts of Uganda with the centre.

The Secretary of State has appointed Dr. A. H. Marshall, C.B.E., City Treasurer, Coventry, and Dr. H. W. R. Wade, Reader in English Law, Cambridge University, to be members of the Relationships Commission. The Commission is expected to begin its work in Uganda on or about January 25, 1961.

West Indies

Constitution

The Constitution of the West Indies (Amendment) Order in Council, 1960, dated August 3, 1960, amends the Constitution of the West Indies by substituting a Cabinet for the Council of State established by Chapter IV, and providing for an executive (instead of an advisory) Public Service Commission, for an executive Judicial Service Commission, for an Auditor-General, and for the appointment of certain senior officers and the staff of the Federal Legislature. It also saves existing appointments, empowers the Governor-General to provide by regulations for retirement benefits for certain officers and by Order to make consequential modifications in existing laws, and it makes some minor and consequential amendments.

Zanzibar

Constitutional Changes

On November 7, 1960, the Secretary of State for the Colonies, in a written answer, stated that he had now considered the recommendations contained in the Report by Sir Hilary Blood in consultation with the British Resident and in the light of the views expressed in the debate in the Zanzibar Legislative Council.

The following main proposals, which vary only slightly from those put forward by Sir Hilary Blood, have been agreed: The Executive Council (which now has seven official and five representative members) will consist of the British Resident as President, three *ex-officio* members and five unofficial ministers. One of the unofficial ministers will be designated as Chief Minister. The Legislative Council (now thirteen official and twelve representative members) will consist of three *ex-officio* members, twenty-two elected members and up to five appointed members. A Speaker will be appointed to preside.

Draft legislation will be placed before the Legislative Council in the near future to enable these proposals to be put into effect in January 1961, when the next elections will take place (Commonwealth Survey, C.O.I., November 8, 1960).

BOOK REVIEWS

PARTY POLITICS, VOL. 1: APPEAL TO THE PEOPLE. By SIR IVOR JENNINGS. [Cambridge University Press. 1960. 45s.]

THE very large number of those who have made their acquaintance with British constitutional history through the pages of Sir Ivor Jennings's well-known works will greet with considerable interest the first of his projected volumes on Party Politics. Two volumes, one on the growth of parties and the other on the development of political ideas, are still to come: the work under review is concerned primarily with elections—in fact, general elections, for by-elections are hardly discussed at all and municipal politics are not mentioned.

Sir Ivor says in his preface that "The main difference between the lawyer's and the historian's view of history is that the former is more concerned with 'subjects' than with events." He does not therefore attempt any continuous narrative, but endeavours to analyse various aspects of nineteenth- and twentieth-century elections such as changes in constituency boundaries and in the franchise, the development of electoral machinery, and the influence of social class, of religion, of the press and radio, and of trade unionism. The book concludes with the author's interpretation of recent electoral behaviour as it has been described in the Nuffield Election Surveys and in a number of local studies.

One cannot but admire the gallantry of Sir Ivor's forays into the realm of social and political research, which have taken him far afield from the purely constitutional studies which he has previously undertaken. But the main criticism of his achievement must be that he has wandered too far and too wide, and seems to have lost his bearings. A great deal of new material on these subjects has been published in the last generation or so, much of it in article form; but Sir Ivor, although he has read his Namier and his Nuffield Surveys, still has considerable gaps in his knowledge of recent work, particularly in the period (say) 1867–1945. It is not really satisfactory to make do with the older political biographies. So far as I can tell, in a book which contains a very large number of footnotes, there is only one reference to an academic journal of historical or political studies. It was perhaps an unfortunate mischance that Mr. Hanham's work on *Elections and Party Management* was published while this book was in the press; nor would the reasonable critic expect Sir Ivor to have done the research on primary sources that Mr. Hanham has done; but surely some of the secondary books and articles of which Mr. Hanham makes such good use might also have found their way into Sir Ivor's reading?

Whatever his deficiencies in this respect, however, Sir Ivor is not afraid to generalise about British political experience. The ideas that he puts into the mind of his average voter, "Bill Bloggs," are no doubt commonly held opinions; and in any case, one could not easily prove them to be otherwise. Historical generalisations, too, come thick and fast. To cite only two examples: Sir Ivor is able to assert that Lancashire industrial firms in the later nineteenth century were smaller than those in Yorkshire, and that this accounts at least in part for the Conservatism of Lancashire politics. No evidence is quoted for either of these assertions. Sometimes the generalisations contradict, and lead him into obvious difficulties. Thus he tells us on p. 279 that the Liberal Home Rule split resulted in "the completion of the transfer of the urban middle class to the Conservative party, where it has remained ever since"; yet on p. 285

we learn that "when the whigs left the Liberal party, the Liberals became the party of the lower middle class." Again, on p. 279 we are told that "from 1890 to 1910 all the safe Liberal seats in England were in industrial areas"; but on p. 284 the Liberal Party "failed to catch the working class vote" in the early twentieth century.

On the subject of the Labour Party and the reasons for its growth Sir Ivor seems particularly remote. The Labour Representation Committee becomes (except in one reference) the Labour Representation Council, and the Social Democratic Federation becomes the National Democratic Federation—misnomers that are particularly dangerous in view of the existence of so many bodies with similar names. Awkward misprints creep in where dates are mentioned. The three chapters on political propaganda and the press contain nothing about *Reynolds's Newspaper*—so important in the nineteenth century—or about the *Clarion* or the Fabian Tracts. The W.E.A. is given some notice, but the almost equally influential N.C.L.C. is ignored. And it is a very unusual impression of the trade union movement which suggests that "every active trade unionist . . . is an active political propagandist." Finally, Sir Ivor's idea of what the rank and file of the Labour Party would have been prepared to accept in 1931 is revealed only too clearly in his observation that

> . . . looking back we can say with reasonable assurance that if all the politicians had advised the King to send for a sensible peer and commission him to form a non-party government for six months the whole problem could have been solved with as much satisfaction to everybody as the circumstances allowed.

The political "propositions" with which the book ends vary considerably in significance and reliability. One of them is that "the most important determinants of party are class, sex and age"—a view which hardly seems an adequate explanation of differences in voting between Ulster and Wales, or even between Lancashire and Yorkshire. Some other "propositions," which seem less exceptionable, verge upon the platitudinous.

There is no doubt that we need a good textbook of British political behaviour over the last century or more. But Sir Ivor's efforts to supply this need cannot be said to have proved successful.

HENRY PELLING.

LOCAL GOVERNMENT IN ST. MARYLEBONE, 1688–1835. By F. H. W. SHEPPARD. [Athlone Press. 315 pp. 37s. 6d.]

THE passing of Hobhouse's Act in 1831 livened up politics in the affluent parish of St. Marylebone. The Radicals, directed by a local "caucus"—the Barlow Street committee, meeting each Monday in Little Barlow Street Infant School—were out to revenge themselves on the clerical-vestry "establishment" which had so long ruled their local affairs. Declaring that they "did not wonder that the ministers used so much soap, for the Lord knew that they required a great deal of washing to cleanse them of their iniquities," they thought that "two cakes of soap ought to last two clergymen for twelve months": and they resolved that it should be strong wholesome yellow kitchen soap, too.

With this, and other examples of the boisterous Radicalism of the age of the first Reform Act, Mr. Sheppard brings his history of Marylebone to a conclusion. In a most readable and impeccably documented volume he covers St. Marylebone from the days of the Village Vestry (1688–1720) down to the end of the Select Vestry in 1832, when by adopting Hobhouse's Act the ratepayers at last got control of their own affairs.

It is on the whole a very happy story of steady and enlightened development —as one would hope from a parish long renowned for the wealth of its leading citizens. As is the case today, a huge rateable value was crammed into a relatively small area bordered by the pleasant greenery of Hyde Park and Regent's Park. Given the will to develop parish functions, the results could often be achieved, for financial means were abundant. What was often lacking was reliable personnel to perform these functions. The wealthy in their noble squares could employ their own watchmen: the rest of the citizenry too often had to rely on the somewhat intermittent preservation of law and order by employees who preferred wenching in the warmth of their watch-houses to regular patrolling in inclement weather.

Public spirit was not lacking amongst the local ruling class. At the time of the excitement over Hobhouse's Act, an admiral (who was also a peer), a general, and a vice-admiral appeared before the Vestry to put the Conservative case, while the Radicals lined up an M.P. and a colonel, with some notable and effective popular demagogues. When success attended the Radical effort and the Barlow Street "caucus" was in control, they had the cunning to put a sprinkling of "respectable" names on the ticket, not the least of whom was Lord Kenyon, a Tory high churchman. (It is amusing, and quite irrelevant, to note that in St. Marylebone today the "radical" party can still call upon the services of aristocrats—the difference now being that such people are convinced radicals—not at all like poor Lord Kenyon.)

In a short note it is not possible to do justice to Mr. Sheppard's scholarly work. For students of the history of local government it is invaluable, for, as Mr. Sheppard frequently refers to the progress of other London vestries, and to the pattern of their problems and the methods of solving them, we have in his book an essential historical base from which to study the problems of government in a great and growing metropolis.

R. H. Pear.

Canada and the Privy Council. By Coen G. Pierson. [Stevens & Sons. 1960. xii and 119 pp. 21s.]

Canadian constitutional lawyers have shown a singular reluctance to write books about their own field of study, and one is not greatly surprised to discover that the author of this monograph on appeals from Canadian courts to the Judicial Committee of the Privy Council is an American professor of history. One is more surprised to read in the Preface that the author was pursuing his researches into the subject in Canada twenty-five years ago and that he made two subsequent visits to London for the same purpose. A further surprise is evoked by the appearance of an inaccurate statement in the first sentence of the Introduction. This is, in fact, a surprising book.

The author tells us that he has three aims: "to acquaint amateur readers in the English-speaking countries with the role of the Judicial Committee of the Privy Council in interpreting and modifying the British North America Act of 1867," to trace the history of Canadian opinion towards the appeal, and to "offer critical, but cautious, comments on the repeal program of the Liberal party." His survey of Canadian opinion includes a useful account of attitudes adopted before abolition of the right of appeal became a live political issue. His conclusions on the factors which led to the decision to abolish appeals in civil cases—a decision not finally implemented until ten years had elapsed after the introduction of the Bill to do away with them—confirm impressions that one had previously formed. The major factor was national pride; dissatisfaction with a number of decisions of the Judicial Committee in the 1930s and with the high cost of appeals were subsidiary factors.

In his handling of the case law the author is seldom at ease. What was decided is usually made clear; but the reason why is apt to be veiled in an

obscurity which the author's explanations do not readily penetrate. Illumination is not facilitated by his resolute insistence on adopting his own technical terminology. He is intrigued by the history and procedure of the Judicial Committee, but the reader ought not to be told that "the pleader is fortunate if he gets more than ten minutes of his brief read without being interrupted by the 'commissioners'"; and the junior member of the Judicial Committee is not necessarily the youngest (p. 15). If the observation that the costs of an appeal (including the fees of counsel) amount to "£150 or more" is to be regarded as an example of understatement, it is offset by the author's description of Berriedale Keith as "probably the greatest author of our time on British constitutional law." The Colonial Laws Validity Act, 1865, is mentioned five times; unhappily, four of the references are misleading in various ways. The fact that from time to time distinguished Canadian judges sat as members of the Judicial Committee to hear Canadian appeals is unrecorded. None of the numerous articles critical of judicial interpretation of the Constitution that were published in the *Canadian Bar Review* after 1935 is cited. Nor is there any account of the abolition of appeals to the Judicial Committee by other members of the Commonwealth since 1945. This omission is not wholly surprising, but the subject may be worthy of investigation elsewhere. The possibility of establishing a new Commonwealth court to supersede the Judicial Committee is being canvassed intermittently in this country, in Canada, and in other Commonwealth countries. If the objection to the continuance of appeals can be shown to have rested primarily on dissatisfaction with the composition and jurisdiction of the Judicial Committee, then fresh ideas may be sympathetically received. If (as is likely) the objections have been founded rather on a nationalistic distaste for supra-national institutions, the reformer may well feel that he should bide his time.

S. A. DE SMITH.

INTRODUCTION TO THE CONSTITUTION OF INDIA. By DURGA DAS BASU. [Sarkar & Sons. 1960. xv and 362 pp. 10 Rs.]

IN a brief review of Mr. Basu's *Shorter Constitution of India* ([1959] *Public Law*, 103–104) it was suggested that if the prodigiously industrious author had any leisure he might consider writing an introductory work primarily addressed to readers overseas. Incredibly, Mr. Basu has already produced a book that is capable of serving that purpose. It is unquestionably the best general account of the Constitution that has yet been published. It is lucid, well-arranged, comprehensive, and not overloaded with citations. The main principles elicited from the leading constitutional cases are set out, but the emphasis is on the text of the Constitution and its amendments, the legislation passed to supplement its provisions, and the conventions and usages that have evolved. Although controversial issues are not shunned, the author's criticisms are reserved almost entirely for India's critics. Some eyebrows will be raised at his comments on India and the Commonwealth and at his somewhat selective treatment of untouchability in India and racial discrimination elsewhere, and Pakistanis will be grieved by his chapter on Jammu and Kashmir. But this *Introduction* is to be read as an informative textbook, not as a moral tract, and it will be warmly welcomed by students of Indian affairs and comparative government.

S. A. DE SMITH.

FREEDOM OF SPEECH IN THE WEST (A comparative study of public law in France, the United States and Germany). By FREDE CASTBERG. [Oslo: Oslo University Press; London: George Allen & Unwin. 1960. 433 pp. 35s.]

THE title of Professor Castberg's book must in one sense be read restrictively. "The West," as the sub-title shows, covers France, the United Sates, and West

Germany. On the other hand, much of the material goes beyond what one might expect. The general constitutional background is sketched in all three countries, the description of the climate of opinion being particularly elaborate for both France and Germany. The treatment is predominantly historical, running back in France to the Declaration of the Rights of Man of 1789 and in Germany to events of the early nineteenth century. In both ways therefore the book is one for general rather than technical reading. While it is true that, for example, a development of the "clear and present danger" test is indicated, the cases are not analysed with the closeness of a strictly legal argument. This character of the book is emphasised by the breadth and type of material used. Much of the French portion relies upon the press itself, both for information of the fact of seizure of particular editions and of the reasons or supposed reasons for the seizure. Similarly general sources are often relied upon elsewhere, thus in the German portion the philosophic and jurisprudential background is developed.

The "general" character is certainly not a disadvantage. The layman can read the book with as much profit as the lawyer, for the former, while reading it as an account of contemporary or modern history, will also be able to realise in a readily comprehensible form the constitutional framework in which the issues of free speech are debated. The lawyer has his law set against tradition and habits with which he may not be familiar or at any rate he is unlikely to have the same degree of familiarity with all three jurisdictions. After the fashion of the day most British readers will be much more familiar with the American than with the Continental portions, and may even find some of the former somewhat too general.

The book then has undoubted interest, but there are points of criticism both minor and of a more serious type. At times translation is unhappy, either in execution or attempt. *Voie de fait* appears uncomfortably as "act of violence," and perhaps to British readers "Act of State" comes nearer to *Acte de Gouvernement* than "Act of Government"; these perhaps fall within the technical terms of a legal system which cannot be translated but the sense of which can only be indicated. Some of the citations also appear strange at first sight. More seriously, there are moments when one is not certain whether generalisations have a safe foundation; for example, during the troubled years, there were other, and happier experiences in America, than those in the University of California to which reference is here made. Moreover, one could wish that the comparison was carried out currently through the book. Sometimes such comparisons could be either pursued or suggested and readers thus aided. A remark is quoted from an American source that universities, in extreme cases, are regarded as "agencies or instrumentalities of the state," with consequential loss of freedom. The comparison with Continental experience may not strike at once, and yet it is possibly important. There is a concluding chapter on comparisons where some of these matters are quickly linked, for example the passport experiences of Western Germany and the U.S.A., but the reader might gain by more current comparison. Indeed, one wishes that Professor Castberg had allowed himself more scope in comment. There is much of interest in this final chapter, but one could wish for more of such reflections by the author both here and throughout. His remarks upon the Supreme Court upholding the validity of laws by adopting an interpretation which frustrates their purpose provoke thought, and one would welcome more of such sidelights. One would certainly like more argument for the proposition that the freedom of one does not mean a restriction for others. One's impression is that -much of the American litigation in the field of freedom of religion has achieved just that result. When all is said, however, this is a book which not only provides the material for thought, but also provokes it, and the author's purpose is well fulfilled. It must be confessed that the outcome of those thoughts is sometimes a doubt whether those who have guaranteed freedoms have really the best of the argument. The

book is a useful and stimulating contribution to the subject, and great industry has profitably gone into its making. If one regrets that Professor Castberg has not left more room for himself it is a regret which does not take away from one's appreciation of what he has done.

J. D. B. MITCHELL.

FRANCE, THE NEW REPUBLIC (*Atlantic Books*). By RAYMOND ARON. Introduction by D. W. BROGAN. [Stevens & Sons, Ltd. 1960. 114 pp. 21s.]

"NOBODY knows exactly what the President can do. The best proof of that is that so many people are saying, 'But when de Gaulle is no longer Prime Minister and becomes President, will he be able to act?'" Occasional passages like this give a somewhat dated appearance to M. Aron's book, which originated in a discussion, with an American audience, a few days after the French referendum of September 1958. However, even though the newly-acclaimed Constitution was not yet in operation, M. Aron—as one would expect—was able to illuminate most of its main provisions, as well as their likely implications in practice.

He starts with the basic problem of constituting a régime strong enough and popular enough to provide and execute solutions to major problems, particularly foreign and colonial ones; after drawing a useful distinction between the failings of the 4th Republic in this respect, and the more spectacular instability of its governments (which in itself often reflected merely the underlying stability of persistence in error or in indecision), he explains why neither the British nor the American system of government could be expected to solve the problem for France. The 5th Republic's brave attempt to combine the "parliamentary" and "presidential" forms of government is then described, with special emphasis on three points: the extensive powers of the President; the drastic limitations on Parliament; and what seemed to M. Aron to be the important innovation of the Constitutional Council. (The prominence given to this was probably unmerited thanks to President de Gaulle's power to overawe, if necessary, all the other organs of the constitution put together—even if not those of the *pays réel*, especially the army.) The ensuing discussion, here reprinted at great (even excessive) length, allowed M. Aron to go into more detail on these points, and others, including Algeria (on which he gives a balanced view of the difficulties in the liberal solution he supports himself), and also the ratification of treaties, with an interesting comparison between the provisions of the new constitution and those of the Bricker Amendment. There is also a helpful account of the various kinds of law stemming from the new constitution, and finally a cogent rebuttal of the view that the agitation against the 4th Republic (whether Communist or "Gaullist") was fundamentally due to economic stagnation.

As always, M. Aron offers a valuable mixture of clear exposition and incisive judgments (the only forecast that reads oddly after two years' experience of the 5th Republic is the expectation that President de Gaulle "will find it extremely difficult to govern the nation, because he has to name a Prime Minister. The Prime Minister, although he is an ordinary man and not de Gaulle, must govern to a certain extent"); and the appended English text of the constitution is also useful, even though the vital electoral law is omitted. However, it cannot be said that this book reflects any very logical view of the nature of the public it was designed to help. It is clearly meant for relative non-specialists, and even for non-French-readers—its only French words, apart from *décrées* (sic), are *coup d'Etat* and *force majeure*—but such readers are unlikely to catch the vast difference between *conseillers d'Etat* and *conseillers municipaux*, when these appear as "state councilors" and "municipal councilors," adjacently and unexplained (p. 24); and the translation of *un scrutin majoritaire* simply as "a majority vote" (pp. 17–18) is

quite inadequate in its context. The statement on p. 51 that "Title VI says that ratification of a treaty requires changing the Constitution," whether M. Aron made it or not, appears to be nonsense, and there are quite a number of misprints, including the extraordinary one (p. 35) of "Falange" for "F. L. N."

R. P. MORGAN.

THE POLISH DIET. Edited by J. HRYNIEWIECKI and A. STAREWICZ. [Warsaw: Arkady. 1959. 124 pp., 56 illustrations.]

THIS richly illustrated and attractively designed booklet, published "on request of the Chancery of the Sejm of the Polish People's Republic," aims at providing the basic information about the present Polish legislature and its antecedents. It consists of three parts: "The Polish Diet in the Past" by B. Lesnodorski, "The Polish Diet in the Period between the Wars (1918–1939)" by A. Gwiżdż, and "The Sejm in People's Poland" by S. Rozmaryn. The first traces the medieval origin and the peculiar subsequent evolution of the Diet, its paralysis by the *liberum veto*, and the unsuccessful reforms of 1791. The second part describes the re-establishment and the rapid decline of parliamentarism between the wars, with due regard to the political forces of the period. The last part analyses the constitutional position and the internal organisation of the Sejm since the war.

The tenor of the authors' comments is revealing for the situation of political studies in Poland today. The first part is scrupulously objective and dispassionate; the second shows a strong left-wing bias, but does not seriously distort reality; the third faithfully follows the official Communist party line on all controversial points.

Z. A. PELCZYNSKI.

PUBLIC LAW

Summer, 1961

Comment

THE pertinacity of Major Buxton in his pursuit of the Minister of Housing and Local Government, with the coincidence of the present doubts about the effective future of the Council on Tribunals, has produced another celebrated case for administrative law.

The following statement of the facts is taken from the judgment [1] of Salmon J. D. Heath & Sons Ltd. were the owners and occupiers of certain land in Cambridge Road, Stansted Mount Fitchet, in the County of Essex. On December 10, 1957, they applied under section 14 of the Town and Country Planning Act, 1947, to Saffron Walden Rural District Council for permission to develop their land by digging chalk. The rural district council were the local authority to whom the local planning authority had delegated its powers in accordance with Part III of the Act of 1947. On April 1, 1958, the local planning authority refused the application. Thereafter Heath & Sons appealed against this refusal to the Minister of Housing and Local Government pursuant to section 16 of the Act of 1947. The Minister caused a local inquiry to be held by an inspector appointed by him under sections 15 and 16 of the Act into the refusal of permission by the local planning authority. Amongst those who appeared at this inquiry, called evidence and were heard, were Heath & Sons, the local authority and four substantial landowners, including Major Buxton, whose land was adjacent to that of the operators and was being used for agricultural and residential purposes.

The inquiry was held on November 13, 1958, and on December 1, 1958, the inspector presented a detailed report to the Minister in which he recommended that Heath & Sons' appeal should be dismissed. The inspector's recommendation was based principally on his findings that there was a serious danger of chalk dust being deposited on the land of Major Buxton and the others in quantities which would be detrimental to the user of the land; and that there was no present shortage of chalk in the locality, although chalk produced from Heath & Sons' land could be sold profitably. The Minister rejected his inspector's report

[1] *Buxton and Others* v. *Minister of Housing and Local Government* [1960] 3 W.L.R. 866.

and allowed the appeal. In the reasons for this given in a letter of September 17, 1959, pursuant to section 12 of the Tribunals and Inquiries Act, 1958, it appeared that the Minister disagreed with the findings of his inspector.

Major Buxton applied to the High Court to set aside the Minister's decision. His principal grounds were two: first, that it appeared from the Minister's letter of September 17, 1959, that in rejecting his inspector's findings of fact, the Minister had relied on certain subsequent advice and information given to him by the Minister of Agriculture without affording the local authority or Major Buxton any opportunity of correcting or commenting upon this advice and information; second, that the Minister's decision was inconsistent with another decision given by him in similar circumstances in relation to land situated close to the land in question.

Major Buxton was met at the beginning of his case with an objection by counsel for the Minister that, not being a " person aggrieved " under the Act of 1959, Major Buxton could not apply to the court, as he sought to, under section 31 of the Town and Country Planning Act, 1959. Salmon J. called this a " perennial question " and echoed a complaint made by the Lord Chief Justice in 1959 that, despite judicial protest for several decades, Parliament persisted in speaking of " persons aggrieved " without making clear what was intended. The judge had little doubt that in the widest sense of the phrase, Major Buxton was undoubtedly aggrieved. But he felt compelled to restrict the phrase to those with a legal grievance. Before the town and country planning legislation, any landowner could develop his land as he liked, provided he did not infringe the common law which was rather designed to protect the right to develop than to restrain it. The law of nuisance and trespass was not a particularly strong container of the freedom to use land. But, said Salmon J., the legislation was designed " to restrict development for the benefit of the public at large and not to confer new rights on any individual members of the public."

The judge pointed out that if the local planning authority had granted permission to develop, Major Buxton could not have appealed to the Minister. He doubted if Major Buxton had any legal right to appear at the inquiry though he agreed that the practice of allowing those affected to be heard was " very sensible." Major Buxton had no rights in the land for the development of which permission was being sought. The common law gave him none. The statutes gave him none.

Many people, feeling that they have been unjustly treated by a public authority, consider, perhaps a little innocently, that resort to the courts of justice is the best way to a remedy. Major Buxton now joins the army of the disillusioned. It may be that he wondered whether he would win on the substance of his case; but it is doubtful

if he realised, until he first consulted his solicitors and counsel, that he might be prevented from even putting that substance to the courts. But established precedent is a hard nut and, like a schoolboy's conker which has had many victories, becomes a lump of granite after years of conflict. The cases go back at least to *Re Sidebotham* (1880). There it was held that when the court has refused to act on a report by the Comptroller in Bankruptcy that a trustee in bankruptcy has been guilty of a misfeasance, neglect, or omission, by which the estate has sustained a loss which the trustee ought to make good, neither the bankrupt nor any of the creditors is entitled to appeal from the refusal. A far cry from Major Buxton and the chalk-pit? Such is the doctrine of precedent.

But, indeed, precedent, as so often, was not altogether clear. Salmon J. referred to another line of authority on the meaning of " person aggrieved." Had Major Buxton been able to apply for a certiorari to quash the Minister's decision, he would have been able to argue that there were cases to show that " person aggrieved " had been interpreted in that context to cover such persons as himself; and that, in any event, the court had power to grant certiorari to a person who did not fall within that particular category. But the Act of 1959, following the common statutory form, once it had provided for a right of application to the High Court, barred any other legal proceedings. So certiorari was not available.

Major Buxton, turned away on the threshold of the courts, looked about him for another form of remedy. The straightforward administrative and Parliamentary method of approaching " the Minister " to seek justice was valueless because it was " the Minister " whose decision he was seeking to upset. We do not know who " the Minister " was; we do not know at what point Mr. Henry Brooke learnt of this dispute. But this was a statutory decision taken in the name of " the Minister " and the only way to reverse it would be for " the Minister " to make a revocation order. This would make Mr. Henry Brooke look pretty silly and although he might be willing to look silly in the cause of justice, there was an alternative method which seemed to promise better.

And so, the Council on Tribunals was approached as this was a complaint, following an inquiry, which was within their jurisdiction. And the Council on Tribunals submitted the matter, presumably with a report, to the Lord Chancellor.

On April 20, the Lord Chancellor made a long statement in the House of Lords. He began by saying that there were two " complaints." (Whether he meant that the Council, or only Major Buxton, had complained is not clear; one of the difficulties in this matter is that the information available to the public has been patchy.)

The first complaint was the consultation by the Minister of Housing and Local Government with the Minister of Agriculture after the inquiry. The second was that the proposal to win and work the chalk was known to have the support of the Minister of Agriculture but that that Department was not represented at the inquiry. The Lord Chancellor explained the background to the second complaint by saying that the Minister of Agriculture was concerned, among other things, with subsidies for lime production and that it was from this point of view and not from the planning point of view that Messrs. Heath had been informed by the Ministry that their proposals would be acceptable.

As no loss of agricultural land was involved, no comments were made by the Ministry of Agriculture on the planning aspect. The Lord Chancellor emphasised that the decision of the Minister of Housing and Local Government turned primarily on the question of possible detriment to adjoining land and not on the need for the production of chalk in the area. He said that the Minister had, after the inquiry, consulted his own alkali inspectors who advised him that there was no real likelihood of dust emission on such a scale as to cause trouble; and that, concerning detriment to crops and animals, the Minister had also approached the experts in the Ministry of Agriculture who confirmed the view of the alkali inspectors.

This statement by the Lord Chancellor stirred the fire. Letters to *The Times* duly appeared and editorial comment was somewhat severe about Ministerial action. Much of the public discussion centred on the meaning of the phrase " new factual evidence." The Franks Report had dealt in four paragraphs (347–350) with such evidence coming to light after the inquiry.

The Report had said: " We think, however, that it is both desirable and possible to draw a distinction at the post-inquiry stage between new factual evidence on the one hand and advice on policy on the other. We recommend that the Minister should be under a statutory obligation to submit to the parties concerned, for their observations, any factual evidence, whether from his own or another Department or from an outside source, which he obtains after the inquiry. In the definition of factual evidence for the purposes of this recommendation we include expert opinion on matters of fact but not expert assistance in the evaluation of technical evidence given at the inquiry. There may be cases in which it is clearly desirable to give the parties an opportunity to cross-examine on the new evidence."

It had been thought that this was one of the many recommendations which the Government had accepted and the Lord Chancellor's statement on this question should fascinate students of politics. He

quoted Circular 9/58 (the most important non-statutory implementation of the Franks' recommendations) which read: "If new factual evidence is brought to the Minister's notice from any source after an inquiry, and in his view, it may be a material factor in the decision, he will give the parties an opportunity of commenting on it. If the Minister considers it necessary, the inquiry will be re-opened." It had been thought that by using the same phrase ("new factual evidence") as that used in the Franks' Report, the Circular meant to incorporate the Report's definition of that phrase. We were the more deceived. The Lord Chancellor now tells us a Government secret. He said that the Government were unable to accept the distinction drawn by the Report between "expert opinion on matters of fact" and "expert assistance in the evaluation of technical evidence given at the inquiry." The Government, he said "have always been clear that new factual evidence which ought to be disclosed could not include technical or other advice given by Government officials on the issues raised at the inquiry and on the weight to be attached to evidence submitted there." The Government may have always been clear. It is a pity they did not make us clear also. It is a pity Circular 9/58 did not include a sentence to this effect. The Lord Chancellor continued in the appropriate jargon that Ministers "must be free to seek such advice . . . cannot be obliged to disclose . . . must inform himself on the best advice available . . . those interested in the applications cannot expect to be brought into this process . . ." and so on. He added: "The Government do not consider that there is any distinction to be drawn between experts who may happen to be in the Department of the deciding Ministry and experts in another Department. The way in which the work of Government happens to be organised is neither here nor there for this purpose." (Apparently it was both here and there a little earlier when it suited the book and when we were told how separate were the "lime production" and the "loss of agricultural land" sides in a single Ministry.)

So the Lord Chancellor concluded that the Ministry of Housing and Local Government had acted "strictly in accordance with the procedure approved by the Government following (*sic*) the Report of the Franks Committee," and that the procedure was proper.

The Council on Tribunals went into session on that reply, perhaps meditating on the peculiarity of a procedure under which private and unpublished statutory reports from an advisory council to their Minister were publicly rejected (if, to repeat, the Council did support Major Buxton's complaint) in Parliament, after the Minister had taken the expert advice of his colleagues. The Council had before

it a memorandum from Major Buxton and issued this statement on April 26: "The Council is concerned at the departure from the recommendations of the Franks Report which the Lord Chancellor's reply now discloses, and accordingly, proposes to pursue the matter further with the Lord Chancellor as a matter of urgency."

On April 27 the Prime Minister answered questions in the House of Commons. He admitted the difficulty of distinguishing between the duty of a Minister to try to evaluate the evidence and the production of new evidence and said that the distinction must be made on "the best basis we can give to the balance of public advantage." Members urged that the matter should be fully reported on by the Council and that, as one member said, "the matter ought not to be left to some secret solution between the Chancellor and the Chairman." The Prime Minister replied that he understood all the correspondence had been published. In this he was mistaken; none of the letters or reports of the Council to the Lord Chancellor had been made known. The Prime Minister said that he understood further discussions would take place and the Lord Chancellor has said that he was ready to discuss "the issues arising out of this case" with the Council.

On May 8, the House of Lords debated the whole question and the Lord Chancellor replied. At considerable length, he said very little indeed. He restated the proposition that a Minister must be entitled to look to officials, in his or another Department, for advice on "the proper conclusions to be drawn from the evidence given at the inquiry." In one important respect, the Lord Chancellor shifted his ground. On April 20, as we have seen, he said that the Government were unable to accept the distinction in the Franks Report between "expert opinion on matters of fact" and "expert assistance in the evaluation of technical evidence given at the inquiry." Neither, he inferred, was "new factual evidence." On May 8, the Lord Chancellor said that the views of the officials in this case were essentially "evaluation of the evidence given at the inquiry, in the sense which the Franks Committee had in mind." A little later in the same speech he again rejected the distinction made by the Franks Committee.

The exchange of definitions and the dispute about distinctions can very easily become over-subtle. Major Buxton might legitimately put it in this way: "Heath & Sons sought permission to do something which I thought would do me harm. An inquiry was held at which the question whether the operation would cause harm was argued and expert evidence called and tested. The civil servant hearing the evidence decided it would do harm and recommended

that it be not allowed. Another civil servant looked at the file and, not knowing about the technicalities, asked the opinion of other civil servants. Those others were experts who were not necessarily more knowledgeable, and perhaps were less knowledgeable, than the experts called at the inquiry. The opinion of the civil service experts conflicted with that of the experts at the inquiry. That of the civil servants was preferred. Why? "

Does not the Lord Chancellor see that his argument sounds completely unreal to the ordinary complainant? If the *only* question was one which was apt for extensive examination at the inquiry, then that examination and the recommendation based on it should surely be accepted. Everyone agrees that the Minister may properly not follow his inspector's recommendation for reasons (such as policy) not apt for examination at the inquiry. But the inquiry must and will appear farcical (and no earnestness on the part of the Lord Chancellor can prevent this) if the evidence of experts A, B and C at a public inquiry, with rights of cross-examination, is accepted by the inspector and then set aside, because of the evidence, on the same point, of experts D, E and F, which is given in private and not open to examination. Perhaps the inspector ought not to be required to make any recommendation but merely to collect the evidence. Perhaps his report ought not to be published. Perhaps there ought not to be any public inquiry at all. Any of these solutions would be more logical than a procedure which looks like a clumsy façade to conceal the reality of Departmental power.

Where stands the Council on Tribunals as a result of this? It is probably better known. But it has not succeeded in forcing the Government to admit acts either of impropriety or even of unwisdom.

The Council, when Major Buxton's complaint was first considered by them, presumably had to decide what their procedure should be in such cases. The published evidence does not suggest that they investigated the complaint. Had they done so, their first action would have been to approach the Ministry of Housing and Local Government and ask for a reply to Major Buxton's allegations. This would have raised most forcibly the question of their whole status and function. The Tribunals and Inquiries Act, 1958, gives the Council no statutory powers of investigation nor may they send for persons and papers as may a Parliamentary Committee. But they could have forced the Ministry either to reply or to have specifically refused to reply and in either event they would have put themselves in a stronger position. The Council most commendably refused to accept the Lord Chancellor's brush off. But to become involved in an argument with him is to be diverted from their main course.

Their argument should be with the Minister of Housing and Local Government. If that argument had been publicly joined, *before* the Council reported to the Lord Chancellor, then the Lord Chancellor, who has so far clearly worn his Ministerial hat, might have been compelled to put on his wig as well. At the moment he is answering for the Government in the Lords, as the Prime Minister is answering for the Government in the Commons.

The Council cannot emerge from this encounter unaffected. From its present position of considerable ambiguity, it must either rise to be a champion for those whom it believes have suffered injustice or become a letter-box for lost causes. The Council should press now and vigorously for greater independence, and the power to make statutory investigations. If it is to have any future, other than that of an advisory council on the drafts of regulations, it must become an inquisition.

Picketing and the Trades Disputes Act, 1906

Few of the Englishman's constitutional rights are more difficult to exercise than the right of peaceful picketing. Providing that he defies the police and obstructs the highway in a sufficiently numerous company and under respectable auspices he may in practice picket anybody or anything. But he must behave with greater circumspection when putting into effect his rights as a trade unionist. The mistake made by the defendant in *Piddington* v. *Bates*[2] was to believe that his statutory right given by section 2 of the Trades Disputes Act, 1906, to attend as a picket for purposes of peaceful persuasion could not be nullified by the fact that the police might anticipate (in both senses of the word) a breach of the peace. Piddington and his friends were not, it was conceded, behaving in a violent or disorderly way or causing obstruction. The police however refused to permit more than two pickets for each door of the premises in question. The defendant, believing that they had no right in law to place a restriction on the number of pickets, stated that he knew his rights and was going to join them, adding that if the police wished to prevent that they had better arrest him. He then " pushed gently past . . . and was gently arrested," and charged with obstructing a constable in the execution of his duty. On an appeal by case stated from a metropolitan magistrate the conviction was upheld. The police were entitled, said the Lord Chief Justice, to take such steps as seemed proper to them to prevent a breach of the peace provided that proved facts existed from which the likelihood of a breach could be reasonably anticipated. Apart from the question of numbers, the facts indicated in the report, however, do

[2] [1961] 1 W.L.R. 162.,

not reveal what evidence there was of likely disorder other than the possibility of intimidation by a number of pickets which the police believed to be unnecessarily large.

Section 2 of the Act of 1906 provides that " It shall be lawful for one or more persons . . . in contemplation or furtherance of a trade dispute to attend . . . for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." The pre- and post-1906 history of the right which is guaranteed by this provision is of some interest. Although peaceful persuasion to abstain from work appeared to have been given a statutory licence by earlier legislation dealing with the molestation of workmen, the effect of the Trade Union, Criminal Law Amendment, and Conspiracy and Protection of Property Acts of the 1870s was to leave the issue in doubt. The last-named enactment in 1875 penalised " watching and besetting " of houses and places of work or " following in a disorderly manner." It provided however that attending merely in order to " obtain or communicate information " should not be deemed " watching or besetting." What remained in doubt was the legality and permissible limits of persuasive as distinct from informative activities. Three cases in 1899 were particularly restrictive in their result. In *Lyons* v. *Wilkins* [3] it was held that watching and besetting had taken place although no violence or disorder had occurred. In *Walters* v. *Green* [4] and *Charnock* v. *Court* [5] the same conclusion was reached when trade unionists attended at railway stations and docks in order to persuade Irish labourers imported for strike-breaking purposes not to proceed to their places of employment. It was said that what the pickets were doing was not imparting information but compelling masters to change their way of doing business. On top of this came the *Taff Vale* decision. In May of 1902 a debate took place in the Commons on the conduct of trade disputes. It was noteworthy, amongst other reasons, for a complete disarray of legal opinion in the House about the effect of the recent picketing cases. The Attorney-General Sir Robert Finlay said that he would " defy any man to show that peaceable persuasion by itself imposes any liability." [6] On the other hand Haldane and Asquith (along with Mr. Keir Hardie) thought that the courts had suggested that it did, and Haldane for his part defied the Attorney-General to say what the position of those who had to conduct a strike now was. Whilst employers might—as the *Mogul Steamship* case had shown—pursue their ends by threat and boycott, any activity by workmen which departed from the " bare

[3] [1899] 1 Ch. 255.
[4] [1899] 2 Ch. 696.
[5] [1899] 2 Ch. 35.
[6] 108 Parl.Deb. 4 s. c. 310.

imparting of dry facts" might be viewed as a violation of the Conspiracy and Protection of Property Act. Four years later the Liberals repealed the doubtful section of that Act and in section 2 of the new Trades Disputes Act specifically added the right of "peacefully persuading" to the old formula about imparting information.

The post-1906 history of picketing shows that Mr. Asquith and his colleagues did not quite succeed in reducing the situation to one of unambiguous Benthamite simplicity. Though the nineteenth-century pitfalls have been removed there remain a number of ways in which picketing may lose the protection of the law and a number of fresh areas of uncertainty. For various reasons,[7] not obviously relevant to the reasonableness of picketing, the premises picketed may not be those of "employers." There may be no "trade dispute" within the meaning of the 1906 Act. Or if there is a trade dispute the action taken may not be in furtherance of it. The conveying of "information" remains a potential source of difficulty. To convey information in a crowd, accompanied by banners, to the employer rather than to employees may still constitute "besetting."[8] To convey it from a recumbent position in the roadway may be an obstruction. The information may be false or there may be an unreasonable trespass.[9] What does section 2 of the 1906 Act envisage about persuasion and information in employments which provide goods or services direct to the public? May pickets attend for the purpose of directing information or exhortation at potential customers rather than fellow-employees? In the Irish case *Brendan Dunne, Ltd.* v. *Fitzpatrick* [10] picketing was held to be unlawful partly because placards exhibited invited the public to support a rival concern. The protest related to late opening in a furniture shop and the public were told (in the indicative mood but with imperative undertones) "You can buy contemporary furniture in Trade Union shops . . . Contemporary furniture? Contemporary closing 5.30 p.m.!" In this case the pickets were also said to be unreasonably numerous, a view which, as already seen, the police may reach in any event and see, possibly even in the absence of any other evidence of non-peaceable intention, as evidence of a likely breach of the peace. The admirable and gentle Thomas Albert Piddington who thought that the Trades Disputes Act meant what it said about the right of "one or more persons" to peaceable attendance deserves some sympathy. It is a little hard to set out to

[7] See *The Roundabout, Ltd.* v. *Beirne* [1959] I.R. 423.
[8] *R.* v. *Wall* (1907) 21 Cox 401.
[9] *McKusker* v. *Smith* [1918] 2 I.R. 432.
[10] [1958] I.R. 29. *Cf. Veeraswamy's Restaurant, Ltd.* v. *Putman, The Times*, January 24, 1961.

vindicate the hard-won rights of the subject and end up as a person convicted under section 2 of the Prevention of Crimes Act, 1885 [*sic*].[11]

G. M.

Referendum to Abolish the Upper House in New South Wales

In December 1959, the N.S.W. Legislative Assembly passed a Bill for the abolition of the Legislative Council, so as to make the State parliament unicameral like that of Queensland. This Bill required the assent of the electors at a referendum before it could become law, in accordance with section 7A which had been placed in the Constitution in 1929 and, in *Att.-Gen.* v. *Trethowan*,[12] held valid, and unchangeable except by a referendum. But owing to a split in the ranks of the Australian Labour Party, which until then held a majority in both the Legislative Assembly and the Legislative Council, the Bill to abolish the Council now faced a hostile majority in the Council, and accordingly the Labour Government had to use section 5B, introduced into the Constitution in 1933 and designed to overcome deadlocks between the Houses. Section 5B required seven steps: the passage of a Bill by the Assembly; its rejection by the Council; passage of the Bill by the Assembly after an interval of three months; rejection by the Council; conference of Managers of the Houses; joint sitting of the Houses; submission of the Bill to the electors at a referendum. If then the Bill were approved by a majority of those voting at the referendum (voting being compulsory), it would become law, notwithstanding the refusal of assent by the Council, on receiving the assent of the Crown. The opponents of abolition in the Council fought these proceedings with every device possible, including refusal to appoint Managers for a conference and to attend a joint sitting, and when the Government announced that in its view the conditions precedent for a referendum had been satisfied, a group of Councillors and other interested citizens brought suit for an injunction to restrain the Government and relevant officials from proceeding with a referendum. The suit was dismissed by the Supreme Court of New South Wales by a majority of four judges to one, and an appeal was dismissed in the High Court of Australia by a majority of six justices to one: *Clayton* v. *Heffron*.[13] The appellants having decided not to seek leave to appeal to the Privy Council, the litigation is now finished. The proposal to abolish the Council was made the subject of a referendum and was defeated.

The litigation raised many detailed points of interest to Australian students, but this note is confined to two matters of more general constitutional importance.

11 [1961] 1 W.L.R. at 164.
12 [1932] A.C. 526 (P.C.).
13 (1960) 34 A.L.J.R. 378.

First, the form of the litigation followed that successfully employed in *Trethowan's* case—an attempt at intercepting the legislative process in mid career. Dixon C.J., McTiernan, Taylor and Windeyer JJ., in a joint opinion whose style plainly reveals the draftsmanship of the Chief Justice, expressed strong doubts as to whether even the members of a legislative body threatened with loss of their offices could obtain injunctions in such circumstances; this supports the view expressed by Dixon C.J. alone in *Hughes & Vale Pty., Ltd.* v. *Gair* [14] that the decision of the Supreme Court of New South Wales in *Trethowan's* case permitting the procedure there used—a point on which no appeal was permitted to the High Court or Privy Council—was wrong. The joint opinion stresses the undesirability of allowing such early access to the courts, giving as a reason the danger that the distinction between matters properly going to validity and matters going only to parliamentary procedure (which courts do not and in general should not consider) might otherwise be overlooked. However, the opinion also concedes that a legislature with constituent powers which desired to secure early judicial intervention in such matters could properly expressly authorise suits designed to intercept a Bill during its passage—a point which this writer has often emphasised to incredulous English audiences when arguing the possibility of applying the machinery dealt with in *Trethowan* and in the present case in order to introduce a measure of rigidity to the Constitution of the United Kingdom. (On the latter question, it should be noted that the opinions in the instant case regard *Trethowan's* case as depending wholly on section 5 of the Colonial Laws Validity Act, 1865, and ignore the suggestion of Dixon J., as he then was, in *Trethowan* that the same result might have followed even in the absence of the last-named Act.) Notwithstanding this view, however, the court permitted the present suit to proceed because of an agreement by the parties—designed to shorten litigation—that the matter should be regarded as a suit for a declaration of invalidity on the basis that a referendum had been held and succeeded and the Royal Assent given to the Bill accordingly. It is suggested with respect that if the court's objections to premature proceedings were so strong, it should have refused to allow the agreement of the parties to overcome them; alternatively, if agreement of the parties is sufficient to overcome the procedural difficulty, it is likely to be forthcoming whenever the Government concerned wishes to observe the rule of law.

The second point of general interest arose from the fact that the fifth step contemplated by section 5B—conference of Managers—and possibly the sixth—joint sitting—had not taken place. (The Governor called a joint sitting and a minority of Legislative Councillors attended,

[14] (1954) 90 Comm.L.R.

but the House by majority resolved not to attend "as a House.") Fullagar J., who dissented, could see no satisfactory ground for distinguishing between the various steps indicated by section 5B, and since some were plainly mandatory, therefore all must be. The other justices differed in the grounds on which they met this argument. The joint opinion penned by Dixon C.J. relies on two grounds: first, notwithstanding the "controlled" character of this constitution, its parliamentary aspects derive from the traditions of the English unitary system, under which the courts will assume conclusively that the procedural steps within the legislature have been regular and so will not inquire whether standing orders have been observed, requisite voting majorities obtained, conferences held and so forth; secondly, on ordinary principles of statutory interpretation, there is a presumption that the procedure for exercising a power is to be regarded as directory only, when the consequences of regarding it as mandatory would work public inconvenience, as would be the case here since invalidity might leave the state without any legislature at all. Kitto and Menzies JJ., in separate opinions, agreed with Fullagar J. that all the steps required by section 5B were imperative, but they also held that the provisions requiring the co-operation of the Legislative Council—being for the protection of that body—were subject to an implied condition that the Council was prepared to co-operate in carrying them out. With respect, the view of the latter two justices seems preferable. The doctrine that courts do not pry into the legislative chambers must have a limited operation in the case of a controlled constitution whose governing provisions specify steps in the legislative process; indeed, the validity of section 7A, requiring a referendum, depends on the view that such a requirement is a "manner and form" of legislating, and it is undoubtedly a mandatory step. As to the general rules concerning "directory" provisions, we are here concerned with a seldom-used procedure of fundamental constitutional importance, carried out in circumstances of maximum publicity and certain to be challenged in the courts immediately in case of any doubt or slip, so that the grounds for treating as directory any part of the section's "anxiously contrived detail"—(in Kitto J.'s words)—were tenuous. It was rather a case for applying the maxim *cuilibet licet renuntiare juri pro se introducto*, hitherto applied mainly in private law contexts.[15]

GEOFFREY SAWER

[15] See *Maxwell on Statutes*, 9th ed., p. 389.

THE SELECTION OF JUSTICES OF THE PEACE

PETER G. RICHARDS

I

FOR six centuries the justice of the peace has occupied an influential place in our public affairs. The scope of his duties—administrative and judicial—grew steadily until the rise of democratic ideals demanded that the expenditure of public funds should be controlled by persons selected by a system of popular election. Thus the justices surrendered the supervision of poor relief to Boards of Guardians and in 1888 the bulk of the administrative business of quarter sessions passed on to the new county councils. But the justices still retain their original duty, responsibility for public order: their office commands a degree of respect which today is far higher than that accorded by Shakespeare to Justice Shallow or by Dickens to Mr. Nupkins. The status of the justice is a reflection of the probity of public life; it is an acknowledgment that their willingness to sacrifice time on communal responsibilities is untainted by any opportunities for personal gain deriving from them.

Each county council and each borough with a separate body of justices has a commission from the Crown and, technically, the names of the members of each bench are placed on a schedule to its commission. This is commonly known as " being put on the commission." Appointments are made by the Lord Chancellor who, for the past fifty years, has received nominations of suitable persons from local advisory committees. In a county the advisory committee works through the Lord Lieutenant. Normally, appointment as a justice is for life, but the Lord Chancellor can remove anyone from a commission at any time; a justice also loses his position should he move to another district. Women have been eligible to serve since the Sex Disqualification (Removal) Act, 1919.

Controversy over the method of selecting justices has tended to ebb and flow with the tides of national political opinion. When Conservatism has been in the ascendant, less has been heard of the topic: with a Liberal or, more recently, a Labour administration in power, inquiries and important changes have taken place. In 1906 the property qualification for county justices was ended. Three years

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later the Liberal Government followed this step by instituting a Royal Commission to inquire into the Selection of Justices of the Peace. Evidence presented to the Commission demonstrated how far the local administration of justice was in the hands of those with Conservative sympathies. At this period Lords Lieutenant personally chose county magistrates. Lord Loreburn described the consequence in this way: " Social life in most counties among those who are well-to-do is mainly Conservative. . . . There is often a large field of selection (for justices) and it is natural that men should regard more favourably those who are of the same opinion as themselves." [1] The Commission found that at least one Lord Lieutenant was assisted by an informal committee which made careful inquiry into conditions in each petty sessional division within his county to enable him to decide how many J.P.s were needed for each area. But over the greater part of the country no such careful scrutiny took place and each Lord Lieutenant consulted variously the chairman of quarter sessions, chairmen of petty sessions, the Clerk of the Peace, Clerks to the Justices, or his personal friends about the need for new appointments and who might fill them. It is not surprising that the Commission reported that there was " some ground for the suggestion that opportunities of obtaining information afforded to Lords Lieutenant are not satisfactory." [2] More support for this conclusion can be found in the figures relating to the religious affiliations of magistrates in Wales at this period; 478 belonged to non-conformist denominations and 1,006 to the Church of England—a proportion which quite failed to reflect the overwhelming Welsh allegiance to nonconformity.[3]

For the boroughs up to 1910 the Lord Chancellor had received a large number of recommendations from M.P.s, parliamentary candidates, political associations and their agents. The inspiration behind these recommendations was obviously political—a desire to obtain favour for individuals prominently associated with a political organisation, Conservative or Liberal. Some M.P.s had openly objected to the role they were expected to play in this system.[4] The Royal Commission reported that it was strongly opposed to the political basis for the selection of magistrates and to the submission of uninvited party nominations to the Lord Chancellor. It urged that working men with intimate knowledge of conditions of life among their own class should be appointed to county as well as to borough benches.

1 Report of the Royal Commission on Selection of Justices of the Peace, p. 8; 1910 Cd. 5250, xxxvii.

2 *Ibid.* p. 7.

3 Royal Commission on Selection of Justices of the Peace, Minutes of Evidence, App. VI; 1910 Cd. 5358, xxxvii.

4 156 H.C. Deb., 4th series, col. 612 (Mr. Henderson), and at Vol. 155, col. 1544, Mr. Luttrell urged that J.P.s be elected by county and borough councils.

And while agreeing that the Lord Chancellor, the Chancellor of the Duchy [5] and the Lords Lieutenant should retain their existing responsibilities in relation to the selection of justices, the Commission proposed that advisory committees be appointed to assist Lords Lieutenant. The Lord Chancellor should also be empowered to create similar committees for boroughs. These committees, it was hoped, would produce a local magistracy drawn from all sections of the community; they would also have the tasks of advising on the total of justices required in their respective areas and the advisability of calling on justices to resign in cases of non-attendance. The Liberal Government authorised the establishment of these bodies which, however, failed to produce satisfactory results.

What guarantee could there be that advisory committees were themselves well suited to carry out their task of nomination? The evidence of Mr. Leo Page, a former Secretary of the Commissions, to the Royal Commission of 1946–48 was not reassuring. In 1943 a borough with a population of over 60,000 had an advisory committee of five people. " The chairman was a man well into his seventies who had been an invalid for a couple of years. A second member was seventy-six and also an invalid; a third member was eighty, a doctor who had retired from all practice, and the only woman member was eighty years of age and almost stone blind. Another committee, this time in a county, consisted of six members in addition to the Lord Lieutenant. The first was eighty-two years of age, deaf and feeble; the second member was eighty; the third was blind and out of touch with the affairs of the county; the fourth was ill and had taken no part in public work for some time; the fifth was an efficient member, and the sixth, the only woman, was over ninety years of age." [6] This frightening picture of senility cannot be reflected today because age limits for committee members have since been introduced. Yet we can be certain that the 1910 Commission had no intention that such aged and feeble persons be entrusted with powers of patronage.

Only too often the benches of magistrates themselves had much in common with the committees described by Mr. Page. In the 1930s there was growing criticism of the work of lay justices. It is usual to associate this criticism with the growth of motoring and motoring offences, for this brought a new type of defendant before the courts —the middle-class car owner—who frequently had legal representation. Thus the well-to-do and the legal profession became more aware of the way in which petty sessions were conducted. Their concern was

[5] In Lancashire the functions of the Lord Chancellor relating to J.P.s are undertaken by the Chancellor of the Duchy of Lancaster.

[6] Royal Commission on Justices of the Peace, Minutes of Evidence, App. 3, p. 81; 1948, Non-Parl.

reflected in at least three authoritative works, *English Justice* by "Solicitor" (1932), *Justice of the Peace* by Leo Page (1936) and *The Machinery of Justice in England* by R. M. Jackson (1940). These authors were men of differing political views and experience, yet their analyses of the shortcomings of magistrates' courts were remarkably similar. Many justices were too old, too deaf, too feeble or otherwise incapable of giving sustained attention to a long and difficult case. Defendants who pleaded "Not guilty" were unpopular because they consumed more time: often they suffered a stiffer penalty than those who admitted a similar offence. Magistrates were often ignorant of the law, or depended too heavily on the clerk of the court. They tended to assume that police evidence must be true: they might resent cross-examination of evidence for the prosecution: they were unwilling to operate the provisions of the Poor Prisoners' Defence Act, 1930[7]: above all, they tended to be more concerned with the preservation of law and order and the protection of private property than with the impartial administration of justice.

Widespread complaints about the age and infirmities of some justices led the Lord Chancellor to issue a circular in 1938 which suggested that justices who were incapacitated for these reasons might apply to be transferred to a Supplemental List. They would not then be summoned to sit in court but would still be available for minor duties as witnessing signatures on various official documents. Transfer to the Supplemental List was voluntary: if a decrepit justice could not be persuaded into retirement, the sole remedy was for the Lord Chancellor to dismiss him from the Commission. And the transfer was no bar to a justice subsequently reappearing in court should he decide so to do. In some areas the 1938 move had the reverse of the desired effect: aged justices, whose attendance at court had become infrequent, were often annoyed by the circular and proceeded to turn up regularly. Two years later the then Lord Chancellor, Lord Simon, initiated the practice of requiring newly appointed magistrates to give an undertaking to retire from active duty on reaching the age of seventy-five. The Justices (Supplemental List) Act, 1941, further strengthened the hand of the Lord Chancellor. The Act empowered him to translate a justice to the Supplemental List and those on the List were prohibited from adjudicating in court, although they could still attend court to deal with administrative business. These useful reforms did not obviate the difficulty of how the Lord Chancellor was to obtain reliable information about the degree of infirmity suffered by ageing justices.

It was against this background that the Labour Government

[7] Now replaced by the Legal Aid and Advice Act, 1949.

established a second Royal Commission on Justices of the Peace in 1946. Labour supporters were also still critical of the social and political composition of local benches which they felt to be dominated by adherents of Conservatism. The Report of the Royal Commission [8] recommended a number of minor reforms including a statutory retiring age of seventy-five—a proposal which was incorporated in the Justices of the Peace Act, 1949. The Report, together with the minutes of evidence, contained a frank explanation of how justices were selected and the extent to which political parties dominated the arrangements. To ensure the preservation of political balance, the Lord Chancellor kept a check on the political affiliations of those who served on local advisory committees: the position relating to county committees in 1946 is set out in the table below.[9]

POLITICAL COMPOSITION OF COUNTY ADVISORY COMMITTEES

Area	*Cons.*	*Lab.*	*Lib.*	*Ind.*
England and Wales (except Lancs.)	169	146	116	34
London	19	15	5	1
Scotland	85	67	67	7
Totals	273	228	188	42

Independents existed on less than one-third of the committees. No Liberal appeared in Northumberland or West Lothian, although the committees for both these areas contained a member styled as Independent. Through the Lord Chancellor's vigilance, nowhere did one party have an absolute majority on a committee. The presence of as many as forty-two Independents on county committees in 1946 was due to the efforts of Mr. Leo Page who held the office of Secretary of the Commissions during the war.[10] Although full information is not available, it seems that the proportion of Independents was even lower in the boroughs than the counties. The Royal Commission was convinced of the value of non-party members and pointed out that independence did not necessarily imply that a person held no political views—more often it indicated that he was not unswervingly devoted to one party. " We think that our national life is sufficiently rich in men and women who, whether they hold political views or not, have true independence of mind and a habit of acting impartially." [11] It

8 1947–48 Cmd. 7463, xii.

9 Royal Commission on Justices of the Peace, Minutes of Evidence, App. 1, p. 55; 1946, Non-Parl.

10 *Cf.* his evidence to the Royal Commission. (Minutes of Evidence, App. 3, p. 81.) The Secretary of the Commissions is the member of the Lord Chancellor's staff responsible for administrative work connected with justices of the peace.

11 Report, para. 80; 1947–48 Cmd. 7463, xii.

advocated that political influence on advisory committees be restricted and that the Lord Chancellor be free to form a committee without persons chosen for their political affiliations if, in any area, he thought he could form an effective committee on this basis. The Commission advised that directions be issued to advisory committees to emphasise *inter alia* the following matters: (a) that no member of an advisory committee should regard himself merely as a representative of a particular party; (b) that the paramount consideration in appointing justices was fitness to perform judicial duties and certainly not the extent of previous political services; (c) that justices should be drawn from all sections of the community. If the above principles were applied, no one political group would normally have preponderance on the bench. Lists of nominations should be scrutinised to see if any one party did predominate. If this should prove to be the case, a list should still stand, in the Commission's view, unless alternative nominations could be made of equal merit to those previously selected.[12] Thus the Commission was prepared to regard the political system of choosing justices as acceptable, providing that further endeavours were made to eliminate possible abuses. A Minority Report, signed by three members of the Commission, was more critical: it urged that members of advisory committees should be chosen irrespective of political considerations, as this would check the evil of political appointments to the bench.

II

The Report of the Royal Commission contained much information about our magistracy, although as the years pass it becomes necessarily less valuable as a guide to the present. On some matters like the age and social classification of justices, the Report is still the most recent source of information available. It estimated the total of justices in England and Wales on the active list to be 16,800, comprised of 13,100 men and 3,700 women; approximately another 2,200 justices were on the Supplemental List. In Scotland, justices were said to number 6,248, exclusive of those *ex officio*: Scotland, quite clearly, had the more plentiful supply and Glasgow alone had above 500 magistrates. For male justices south of the border the most common age-group, in terms of five-year spans, was 65–69: 28 per cent. were age seventy or over, 65 per cent. were age sixty or over while a mere 10 per cent. had yet to score a half-century. One gentleman, still on the active list, had reached the age of ninety-five. Women justices were somewhat younger, but at the time of the Commission's investigations women had been admitted to local benches for only a quarter of a century,

12 *Ibid.*, para. 84.

which may help to explain the disparity. The figures showing the extent of the justices' attendance at adult courts are most revealing. Over half the male justices in the counties went to court less than once a month, while 12·6 per cent. did not attend at all. 7·2 per cent. of women county justices did not attend. Percentages of absentees in the boroughs were 8·7 per cent. men and 4·6 per cent. women. It is apparent that a significant proportion of justices were prepared to enjoy the dignity and prestige of the designation J.P. without giving any real service to the community in return.

The table below, reproduced from the Commission's Report, shows the occupational categories of male justices on the active list:

OCCUPATIONS OF MALE JUSTICES

Percentages

Category	Counties	Boroughs	Total
Not occupied	3·9	2·5	3·5
Professional [13]	22·1	19·2	21·3
Employers [14]	29·6	31·4	30·0
Small businessmen [14]	17·5	13·3	16·5
Salary earners	13·0	16·1	13·7
Wage earners	13·9	17·5	15·0
	100·0	100·0	100·0

Similar classification of women was more complex and perhaps less satisfactory. Over two-thirds of women justices were placed in the not-occupied category when judged in terms of remunerative activity; no doubt the majority of them were engaged, more or less busily, in running a home. If judged in terms of their husband's status, by far the largest group was in the professional category. Attendance records of women were rather better than those of men, and it is reasonable to connect this with the age differential. Among the men, those with the better attendance figures belonged to the larger employers, the salary-earners and the wage-earners: these groups may suffer less financially for devoting time to public responsibilities than do professional men and small businessmen.

In addition to the justices appointed in the ordinary way there were in 1948 roughly 2,500 *ex officio* justices. They fell into three

[13] This is an overriding classification. Thus a solicitor may be salary-earning but he will be classed as a professional man.

[14] Employers are defined as those who employ at least ten people or who occupy higher managerial posts. Small businessmen are those in business on their own account and employ less than ten people.

broad classes: those who held certain high offices of state; those who held judicial offices; those who held certain positions of local importance—mostly in local government. In the first division are the Lord Chancellor, the Lord Keeper and Privy Councillors,[15] all of whom are on the commission of the peace for each county. So also are the judges of the Supreme Court and the Law Officers. Judicial office-holders appointed to the commission for any area in which they adjudicate are county court judges, the chairman and deputy chairman of the County of London Sessions, chairmen and deputy chairmen of quarter sessions appointed under the Administration of Justice Act, 1938, recorders, stipendiary magistrates [16] and metropolitan police magistrates.[17] Local dignitaries on the bench are the Keeper of Rolls of the county (*custos rotulorum*, usually the Lord Lieutenant), the mayor of a borough, the chairmen of county and district councils, aldermen of the City of London, the Archbishop of York and his Chancellor, the Bishop of Ely and his Steward, the Chancellor, Vice-Chancellor and Deputy Vice-Chancellor of the University of Oxford [18] and the Vice-Chancellor of the University of Cambridge.[19] Before the Justices of the Peace Act, 1949, ex-mayors remained on the bench for twelve months after surrendering mayoral office. The Royal Commission had also proposed that the chairmen of county and district councils should cease to be *ex officio* magistrates because the qualities needed to preside successfully over a local council were not necessarily the same as those required in a justice. Further, a local authority chairman who held his office for only a year could not gain enough experience to be a useful member of the local bench. There is, of course, nothing to prevent local chairmen being chosen as magistrates in the normal way: indeed, the Royal Commission found this was common practice and applied to 26 per cent. of mayors and ex-mayors, 76 per cent. of chairmen of county councils, 13 per cent. of chairmen of urban districts and 24 per cent. of chairmen of rural districts.

In Scotland, *ex officio* justices drawn from local authorities include the lord provosts and bailies of large burghs, and provosts and bailies of certain other burghs, the covenors (chairmen) of county councils and the chairmen of district councils. The Royal Commission

15 It is rare for Privy Councillors to exercise their rights as J.P.s. However, Lord Ogmore joined the Westminster Bench in 1960: *The Times*, January 13, 1960.

16 There were sixteen stipendiary magistrates in 1948. Where stipendiaries are appointed, the work of lay magistrates is reduced, but not eliminated. Arrangements for sharing the work vary from place to place.

17 There were twenty-six metropolitan police magistrates in 1948. In London the work of lay magistrates consists largely of juvenile court work, licensing business and cases brought by local authorities for the recovery of rates, etc.

18 The Oxford University (Justices) Act, 1886.

19 Municipal Corporations Act, 1882, s. 249.

recommended no changes north of the Border because there the status of justices is somewhat different from that in England and Wales. Much of the judicial business in Scotland is performed in the sheriff's court and the duties of the magistrates are correspondingly reduced. Yet, partly as a matter of law and partly as a result of tradition, there is more work for justices in "signing papers." Their office is regarded less as a judicial one but rather as a civic honour: in these circumstances it is appropriate that leading members of local authorities should be justices. For the rest, the Secretary of State for Scotland is advised about new appointments by local advisory committees as in England and Wales.[20]

The Lord Chancellor's Department has to try to ensure that those nominated to become justices, and those *ex officio*, are not for any reason disqualified from becoming magistrates. Disqualification barriers are both statutory and non-statutory. The first group includes bankruptcy, corrupt practice at an election, or conviction of treason or felony for which the sentence imposed was at least twelve months' imprisonment. Some justices are prohibited from adjudicating in a particular type of case, *e.g.*, a member of a local authority may not sit on a bench which is hearing a rating appeal that concerns his authority. Similarly, a person with a financial interest in the drink trade may not sit for licensing business. A solicitor may not practice directly or indirectly before a bench of which he is a member. The numbers of these disqualifications in 1946 was reported by the Royal Commission as follows [21] :

Category	County	Borough	Total
Members of local authorities	3,743	1,449	5,192
Employed by local authorities	295	164	459
Disqualified for licensing business	552	408	960
Members of legal profession	368	115	483

In addition to these legal prohibitions the Lord Chancellor, in practice, has various grounds for objection to nominations. Others barred include those convicted of serious offences which fall outside the statutory restrictions, members of the police force, pawnbrokers,[22]

[20] Responsibility for Scottish justices was transferred from the Lord Chancellor to the Secretary of State following the recommendation to this effect by the Royal Commission on Scottish Affairs (Report, paras. 142–144; 1953–54 Cmd. 9212, xix). The Scottish Commission urged this course although it agreed that existing arrangements were satisfactory: nor did it seem to consider the argument of the 1946–48 Commission that such a change should not be made as the Secretary of State might be subject to greater political pressures over the appointment of justices than is the Lord Chancellor. (Report, para. 321; 1947–48 Cmd. 7463, xii.)

[21] *Cf.* Minutes of Evidence, App. 4; 1948, Non-Parl.

[22] The Royal Commission felt that there should be no inflexible bar against these categories: Rechabites should not, however, participate in licensing business.

brewers and licensed victuallers,[22] members of the Independent Order of Rechabites,[22] justices' clerks, probation officers, the blind and the deaf. M.P.s and parliamentary candidates are not appointed as justices for any area covering the constituency they represent or hope to contest.[23] It is unusual to appoint husband and wife to the same bench: when it is done, they are asked to give an undertaking not to sit together. Finally, ministers of religion are not appointed unless no other suitable person is available in the locality. These various disqualifications have been thought necessary to eliminate the possibility of suspicion of bias in the local administration of justice. They represent a series of rules made by the central government to stop the patronage power of local advisory committees being used in a way that might damage the good reputation of the magistracy.

Reputation is also affected by the capacities of existing justices. Judicial authority should not be vested in those manifestly unsuited to its exercise through old age, decaying mental or physical powers. As noted above, the Justices of the Peace Act, 1949, ensured that justices are placed on the Supplemental List on reaching the age of seventy-five. A justice may, of course, become seriously incapacitated at an earlier age; whether any action is taken in such a case will depend on the accident of how far reliable information is received by the Lord Chancellor. Alternatively, it may be found that some justices are morally, intellectually or temperamentally unfit to adjudicate. This raises more delicate issues. The Lord Chancellor can remove any justice for "unsuitability," a power which is used, very properly, with great caution: the independence of the judiciary is regarded as the traditional safeguard of impartiality. To be dismissed from the Commission of the Peace could also do grave harm to the reputation of the individual justice concerned. But the Lord Chancellor must intervene when the continued presence of an undesirable person might damage the reputation of a local bench.

The Lord Chancellor has a small staff to assist him with the appointment of justices.[24] At the head of this staff is the Secretary of the Commissions. The Royal Commission urged in 1948 that the status, *i.e.*, the pay of this official be improved and the number of his assistants, two or three, be raised. Little has been done on these lines and the Secretary of the Commissions—following the recommendations of the Royal Commission on Taxation of Profits and Income [25]

[23] If a justice is elected to the Commons for a constituency that comes within the area for which he is on the Commission of the Peace, he is invited by the Lord Chancellor not to sit while he is an M.P. *Cf.* 415 H.C. Deb., 5th series, cols. 2089–2090.

[24] In Lancashire the Chancellor of the Duchy works through his own staff.

[25] Final Report, para. 962; 1955–56 Cmd. 9474, xxvii.

and the Franks Report on Administrative Tribunals [26]—has become responsible for a wider range of appointments of a quasi-judicial nature to a variety of bodies. It can be argued that the meagre character of the administrative resources afforded to the Lord Chancellor has an important impact on the techniques of appointment. Political parties are firmly established as the main channels of influence through which the Secretary of the Commissions is accustomed to work: the organisation of wider, alternative sources of information about the suitability of persons to become members of advisory committees would undoubtedly require more generous staffing in Westminster.

It is clear that the constitution and *modus operandi* of the local advisory committees are of the greatest significance in the appointment of justices. The committees are nominated by the Lord Chancellor; in counties the Lord Lieutenant is normally the chairman and in boroughs the Lord Chancellor selects a chairman. When vacancies occur on these bodies it is not uncommon for the existing members, especially the Lords Lieutenant, to suggest names for possible new members. The committees are usually small. The size is about six or seven, but sometimes is as low as three—one representative each of the Conservative, Liberal and Labour Parties. Those nominated to serve on advisory committees are themselves normally justices: thus local benches are, in effect, self-co-opting. No one above the age of sixty-five is now chosen and if a new member is not already a justice, the practice is to add him to the local Commission at the first convenient opportunity. Members are appointed for a six-year term and the maximum age for reappointment of an existing member is sixty-nine. The domination of political parties over these bodies has already been described. Explicit notice is taken of political sympathies in order to maintain " balance ": when a possible new member, Smith, is thought to belong to a particular party, the Lord Chancellor makes inquiries at the national headquarters of the party concerned to discover if Smith is still regarded as a supporter. Should the headquarters reply " Smith belongs to our party, but we would prefer you to choose Jones "—Smith is still appointed. Even so, this practice is open to objection and the Royal Commission recommended unsuccessfully that it be stopped.[27] Membership of committees is secret [28] in order to prevent the possibility of unfortunate lobbying. Names of committee secretaries—usually the clerk of the peace for

[26] 1956–57 Cmnd. 218.

[27] Report, para. 78. Mr. Dingle Foot, then a Liberal, was the sole dissentient to this view. It is, or was, sometimes difficult for the Lord Chancellor to discover whether a potential Liberal member was a Liberal or a Liberal National and, therefore, virtually indistinguishable from a Conservative.

[28] The pre-war practice of revealing membership of a particular committee in response to a parliamentary question has been stopped.

the borough or county—are now made public, and any representations about membership of the local bench can be made through them. As all these proceedings are highly confidential it is not possible to discover how far associations, other than political parties, put forward names for consideration. However, one has the impression it is fairly uncommon for this to be done.

The functions of advisory committees go beyond the submission of names of potential new magistrates. They also consider how many magistrates are required for their area, and scrutinise the attendance records of existing magistrates. Should any question arise about the desirability of removing a magistrate from the bench—because of his temperament, conduct or involvement in legal proceedings—the local advisory committee will review the case. Advisory committees are expected to be unanimous about the candidates they nominate: it seems an individual member of an advisory committee can exercise what is nearly a veto power. In many English counties, candidates considered probably suitable for appointment are placed on a waiting list. A borough usually has no waiting list as the advisory committee meets less frequently, but it is in the smallest boroughs that there is most difficulty in finding suitable persons. In some counties the chairmen of petty sessions are asked to suggest names for consideration by the advisory committee, and members of the committee may themselves make discreet inquiries.[29] Such preliminary investigation is less needed in boroughs when the committee members will tend to have—or think they know—the requisite information.

The Lord Chancellor's department gives careful scrutiny to the names and numbers put forward by local committees. Westminster may take the view that too many, or too few, names are suggested. Attention is also given to the age of candidates: normally the maximum age is sixty-five and the Lord Chancellor is reluctant to appoint people over sixty. In the case of boroughs the Lord Chancellor insists that not more than one-third of borough magistrates shall be members of the Town Council. It is also necessary to try to ensure that none of the nominees are disqualified for any reason. Finally, the Lord Chancellor requires to be satisfied about the qualifications of potential magistrates. It is accepted that the effect of political influence on the choices made is considerable. But the Lord Chancellor tries to establish that new justices have engaged in some form of public service other than activity within a political party. For one reason or another roughly half the lists of nominees submitted by advisory committees are returned to them with critical observations

[29] A description of the proceedings of advisory committees is contained in the evidence submitted by the Lord Chancellor's department to the 1946 Royal Commission, Minutes of Evidence, App. 1; 1946, Non-Parl.

or requests for fuller information. And the Lord Chancellor may submit names to a committee should he know that a particularly suitable person, *e.g.*, a retired colonial judge, or a justice from elsewhere, has moved into its area. These representations are not always well received for a committee may consider a period of local residence to be an important qualification—a rationalisation of dislike of "outsiders"; local knowledge is as much a disqualification as a qualification to administer justice.

Once the Lord Chancellor has agreed to a list of new appointees his department writes to the persons concerned and asks if they are willing to serve. It is improper for an individual to be approached before he receives the formal request from the Lord Chancellor. Few invitations to join the local bench are refused. No doubt this is a reflection of the status and honour associated with the letters J.P., but it is also the case that the majority of those approached are accustomed to spend an appreciable amount of time on public affairs. Yet some new magistrates find it less convenient to sit on the bench than they anticipated. It might be better if the invitees considered the implications of becoming a magistrate more fully and for the Lord Chancellor to receive rather more refusals.

III

The Royal Commission of 1910 proposed the establishment of advisory committees, it will be recalled, to ensure that justices were not chosen solely from the dominant political and social circles in a local community. This has been achieved by getting a political balance on the committees, and, therefore, among the magistrates they nominate. But while this process may help to satisfy those groups previously under-represented, it is quite irrelevant to the problem of obtaining justices of the highest possible calibre. The idea was widely held that a number of Left-wing or working-class magistrates are required so that local benches may be properly appreciative of conditions of life among the lower orders. Yet such magistrates, perhaps over-conscious of their own virtue, are sometimes more severe and merciless than their fellows. It is clear that local political personalities failed to provide the nation with a satisfactory local judiciary. The preceding pages have described some of the series of badly-needed reforms commenced in 1938. Other changes, the rules about the size and chairmanship of benches [30] and the provisions made for new magistrates to receive instruction in their powers and duties, fall outside the scope of this study. The growing strength of the Magistrates' Association is another indication that justices now

[30] S.I. 1950, No. 1908.

take their responsibilities more seriously. The President of the Association is the Lord Chancellor of the day. It issues a monthly journal and arranges meetings and conferences designed to assist justices in the performance of their duties. It also acts as a link between the magistracy and Government Departments and may present evidence to official bodies inquiring into social problems. Since its foundation in 1920, membership has grown steadily, even during the war years: it reached 6,000 by 1946, 6,700 by 1948, 7,800 by 1950, 9,000 by 1952 and 10,000 by 1957.[31] Since then an increase in the annual subscription from £1 to £2 has slowed the rate of increase. But in spite of the growing support, it would appear that roughly half of the justices on the active list still feel unable to join the Association.

The substantial efforts made to reduce the shortcomings of lay magistracy have thus borne fruit. Yet the central issue remains, assuming law magistracy is to continue, whether the present system of largely political appointments is the best that can be devised. Certainly, the problem of politics will not be solved by ignoring it: if no check is made on party affiliations there is a strong possibility that supporters of one group will dominate the bench. Men and women who become prominent in public affairs, especially in boroughs, often do so in connection with political activity. There has been a notable change in Left-wing opinion on this issue. In 1910 it was highly critical of the technique of choosing justices; by 1946, with the advent of politically balanced benches, it was in favour of the *status quo*. In Labour eyes, a person who does not support their Party is classed as conservative, albeit with a small "c"; most "independent" members of local authorities do tend, in fact, to be conservative rather than socialistic in their sympathies.

Yet the idea of a politically balanced bench creates a number of difficulties. What exactly is meant by balance? Does it mean that the local Commission of the Peace should reflect more or less accurately the results of the most recent parliamentary election in the area? While the official answer to this question is "no," it is also the case that election results do have some impact on the nominations made —witness the sharp rise in the proportion of Labour supporters chosen to be justices in Lancashire after 1945.[32] Again, the number of Liberals on advisory committees in 1946 was high compared with their voting strength. The number of Liberals has since fallen but, in keeping with the recommendations of the Royal Commission, an attempt has been made to increase the number of non-party independents on the committees and on the bench. In particular, the

31 I am indebted to Mr. J. F. Maddon, Secretary of the Association, for these figures.

32 Royal Commission on Justices of the Peace, Minutes of Evidence, App. 2, p. 78; 1948, Non-Parl.

advisory committee for London, severely criticised by the Royal Commission,[33] was subsequently reconstructed.

Insistence on political balance in the choice of justices may well have adverse effects on the calibre of those appointed. There is no reason to assume that the candidates most suitable to join the Commission for any particular area distribute their political sympathies in the appropriate proportions. Suitability for a task of this kind is not a matter that can be precisely determined, but if political parties claim a quota of seats on the bench it seems unlikely that the quality of their nominees will always be equal to that of many people willing to serve but who are not considered. Devotion to a political cause might well be regarded as a disqualification for judicial work, except perhaps for those who have had a legal training. Political enthusiasm is not synonymous with a disinterested, unemotional or impartial outlook. Using the local bench as a means of political reward also helps to keep the age of justices high, for a party may expect, say, twenty years of faithful support before the reward is offered. The principle of requiring advisory committees to be unanimous about the names put forward does help to increase the importance of their independent, non-party members. Without them, there is a real danger of horse-trading between the parties—"You agree to our list and we will not scrutinise yours." The vigilance of the Lord Chancellor's staff is another safeguard against this possible abuse. Alternatively, should a local committee submit a list that is politically unbalanced the Lord Chancellor would, presumably, not reject it, at least on political grounds, for he would know that the political groups under-represented must have accepted it as containing the best possible nominations.

The chances of change in the present position are small. The Lord Chancellor's department has an attitude of positive acquiescence: the Labour Party is in favour of the existing arrangements as providing it with the best chance of a good place in this particular sun: Conservative opinion is more critical, but the Party seems unlikely to campaign to abolish a system which provides a form of honour for its active supporters. Yet will the parties always be able to provide sufficient suitable justices? In some areas the Labour Party appears to have difficulty in providing its quota. Service as a justice involves minor out-of-pocket expenses and for wage earners it may lead to loss of remuneration. The Royal Commission of 1946 rejected the idea that subsistence allowances and compensation for loss of earnings should be paid as is now done for members of local authorities. It argued that such payment would detract from the authority and dignity of justices, that most justices would not welcome it, and that

[33] Report paras. 294–303; 1947–48 Cmd. 7463, xii.

few persons, eminently suited to be justices, were in fact debarred from serving *solely* for financial reasons.[34] Labour circles do not agree, especially with the last conclusion, and in February 1959 the T.U.C. General Council sent a letter to the Home Secretary which urged that such payments be made.

Some justices, of course, have no connection with local politics and are chosen because of their record of activity in other types of public body. Obviously it would not be difficult to increase their number. Churches, social welfare and educational organisations, women's organisations, residents' associations and universities all contain persons unquestionably suitable to be justices. The objection to recruiting more in this way is that benches would tend to become politically conservative again, although not consisting necessarily of active party supporters. How far this would happen, in fact, cannot be known, but the Labour Party believes it to be the case. The more significant question is whether the objection is relevant. As social distinctions disappear, is it still necessary to take special precautions to ensure that justices have knowledge of " working-class conditions " —especially when these precautions have led to undoubted evils?

[34] Report, paras. 200–212; 1947–48 Cmd. 7463, xii.

THE PASSING OF THE MINISTRY OF TRANSPORT AND CIVIL AVIATION

A. DUNSIRE

WHEN Mr. Harold Macmillan formed his Government after the General Election of October 8, 1959, he made certain changes: Mr. Harold Watkinson, former Minister of Transport and Civil Aviation, became Minister of Defence in place of Mr. Duncan Sandys, who took up a new Ministry, the Ministry of Aviation, formed out of part of Mr. Watkinson's former Ministry and part of Mr. Aubrey Jones' Ministry of Supply (which title now disappeared), the rest of the Ministry of Supply going back to the War Office or the Air Ministry. There were other changes, but the only one relevant here was the transfer of responsibility for merchant shipbuilding from the Admiralty to the Ministry of Transport. Here is how Mr. Macmillan explained himself when Parliament met:

> " Meanwhile, the Government have a special duty towards industries such as aircraft, shipping and shipbuilding which face, or will face, increasing competition from all over the world. It was for this reason that I decided to appoint one Cabinet Minister with special responsibilities for aviation matters. My right Hon. Friend the Minister of Aviation will have the special task of strengthening the aircraft industry and co-ordinating its activities with those of the airlines. . . .
>
> " This change will involve the winding up of the Ministry of Supply and the transfer of some of its functions, those regarding stores and certain military equipment, other than aircraft and rockets, of course, to other departments, mainly the War Office. . . .
>
> " In the same way, shipping, shipbuilding and ship repairing will now all be within the Ministry of Transport, but that Ministry

* The author, who is Lecturer in Public Administration in the University of Exeter, served in the Ministry of Transport and Civil Aviation from 1957 to 1959. The opinions expressed are his own, and nothing in the article is to be taken as representing the present views of members of any Government Department. The author is grateful for help given by friends in the Ministry of Transport and the Ministry of Aviation.

being no longer associated with aviation, will be able to concentrate its efforts on all forms of surface transport."[1]

When a Cabinet reshuffle occurs, public attention is caught, for nine days or so, by the implications for Government policy, or by the effect on the careers of the statesmen involved. The statutory and administrative actions required to effect the *departmental* reshuffle are taken for granted, and any personal problems created for the officials involved are quite properly regarded as a domestic civil service affair. There may nevertheless be some interest in a brief account of some problems and consequences of the changes of October 1959 written from the point of view of a civil servant in the former Ministry of Transport and Civil Aviation.

Personal Consequences

The most important domestic issue in the Ministry of Transport and Civil Aviation in the spring of 1959 had nothing to do with Government reshuffles. Gossip had it that the Ministry of Works was not prepared to take a further lease of Berkeley Square House, the headquarters of the M.T.C.A., at the rent being asked; and it had been officially announced that the entire staff of the Ministry, including those located in other buildings in West and West Central London, would be moved to a new building being erected in Southwark, St. Christopher House. Few of the staff in any class or grade were looking forward to a move south of the river, for though in many cases it would ease their daily commuting, it offered less salubrious outlooks and little hope of lunch-hour shopping[2]; and the rumour which at this point broke, that the Ministry (formed in 1953 by a merger between the Ministry of Transport and the Ministry of Civil Aviation) would again be split, gained currency not only for itself but because it somehow offered hope that a West End location could be preserved.

Such rumours are nearly always soundly enough based on something confidential heard or seen but not necessarily accurately. Even the Assistant Principals (who are usually the assiduous canvassers of high-level rumours) were mildly surprised when the rumour was confirmed—or so it seemed—at the highest possible level. In the House on June 30, Mr. Awbery asked the Prime Minister if he would, in view of the growing importance and extension of aviation throughout the world, consider the creation of a separate Ministry of Civil Aviation

[1] 612 H.C. Deb., col. 74.

[2] A curious side-effect (of social class?) is seen in the refusal of some canteen and cleaning staff to move to St. Christopher House at all. They are accustomed to work near their homes, and they can, of course, easily get alternative West End work today. So canteen managers are accustomed to recruit "local labour"—even in different parts of central London.

for the purpose of dealing exclusively with questions of civil aviation. Mr. Macmillan's first answer was that the end of a Parliament was not the best time for a change. Then Air Commodore Sir Arthur Harvey asked for an assurance that, when his right Hon. Friend came back as Prime Minister after the General Election (then not yet announced, of course) something would be done for the aircraft *industry*. The Prime Minister's reply was:

> "I recognise the problem. Like many others, we are trying to deal with it by committees of Ministers, and by the Cabinet itself; but I fully realise that, just as we have sometimes made amalgamations of Ministries, conditions might change and it might be desirable to make further groupings. All that requires much study to which I have given a great deal of preliminary work."[3]

After that, each week blew an ambiguous breath of a wind of change for those who held up a wet finger.

Officially, the Ministry was completing its integration rather than the opposite. Rationalisation of the two different punched card systems which the Ministry had inherited in 1953 was in its last stages; tenders were being invited for the design of a computer to handle the joint accounts, and preparations were going ahead for the decanting of accounts staff to new accommodation in Hemel Hempstead, as the department's contribution to the dispersal of civil servants from central London.

With the announcement of the General Election expectation that the Ministry would be divided grew, and was fed by hints that even with a Conservative victory Mr. Watkinson did not expect to be back. This culminated in the middle of the campaign in a story that the splitting of M.T.C.A. had been determined if the Government were returned: civil aviation and shipping were to be hived off, leaving broadly a Ministry of Inland Transport. Discussion went as far as the supposed inevitable loss of the Cabinet seat; and people began to make up their minds which side they would like to be on.

The first *hard* news that all but a handful of the officials had came at the same time as to everyone else: by newspaper and radio after the announcement from Downing Street six days after the Election. On the following day, October 15, this Establishment Minute was circulated to the Ministry of Transport and Civil Aviation:

> The Prime Minister announced yesterday the following Ministerial changes:
>
> Mr. H. Watkinson to become Minister of Defence.

[3] 608 H.C. Deb., col. 244.

> Mr. D. Sandys to become Minister of Aviation.
> Mr. E. Marples to become Minister of Transport.
>
> The new Ministry of Aviation will incorporate the aviation responsibilities of this Department and of the Ministry of Supply.
>
> The new Ministry of Transport will cover the existing inland transport and shipping functions of this Department together with the responsibility for shipbuilding and ship repairing at present exercised by the Admiralty.
>
> The necessary staff and organisational changes will take place as soon as possible.

It is not impossible that nothing more detailed than this was known at that date even in the highest reaches of the Department. In contrast with the 1953 situation, when there had been a whole year to prepare for the merger of Transport with Civil Aviation,[4] the much more complicated transfer of functions involved in the appointments announced by the Prime Minister on October 14 had been preceded by virtually no administrative planning whatsoever in the Departments.

The prompt Establishment Minute of October 15 was sufficent to allay any deep anxieties to which lower grades of staff in particular might have been subject: for instance, that redundancy might follow.[5] The personal anxiety of another group was also allayed: some one hundred officers, with the encouragement and assistance of the Ministry, had already moved house to Hemel Hempstead, or were about to do so, or had contracted to buy a house there, in anticipation of the transfer of the accounts divisions. It was apparent that this scheme might have to be reconsidered, but it was accepted that work would be found at Hemel Hempstead for the officers concerned.

After liaison with the staff side of the Whitley Council, later Establishment Minutes gave assurance that people already on M.T.C.A. promotion panels would retain these prospects in whatever new Ministry they found themselves, and that applications for transfer would be given every consideration if made before a certain date.[6]

This question of possible transfer was perhaps the greatest personal decision which the reshuffle presented to the officials of the Ministry of Transport and Civil Aviation. Practically everyone bar the youngest

4 See F. C. Hampden, "The Organisation of the Ministry of Transport and Civil Aviation" (1955) 33 *Public Administration*, 94.

5 Questions were asked in the House of Commons on November 10, 1959, about the extent of redundancy through the "closing of the Ministry of Supply," and about whether work would be found on Merseyside for ex-Ministry of Supply staff employed there. It was made plain in answers, and in debates in both Houses, that since no work was being discontinued there could be neither redundancy nor savings. 613 H.C. Deb., cols. 192, *18*.

6 January 11, 1960. Until that date staff records were maintained as if M.T.C.A. and M.O.S. were still in being.

had had experience of either the Ministry of Transport or the Ministry of Civil Aviation before the merger in 1953, and there were several who had come with the Ministry of Shipping in 1941 (itself an offshoot of the Board of Trade). In spite of much cross-posting among the three sections of the Ministry, many people retained a strong sense of being a Transport man or a Civil Aviation man and this alone may have induced some to apply for transfer back to the section which held their loyalty.

For others it was the type of work which swayed the decision. Anyone who had been on the shipping side tended to rank that highest, approximating in certain posts to Foreign Office quality, dealing with wide themes of national importance, free from pettifogging detail or bureaucratic meddling. So there were many to say " wherever shipping goeth, there would I go "; and one of the early preferences expressed to Establishments Division before the lines of the split were known was in this form. Inland Transport had more in it of the typical government department: some wide planning, some direct execution, some regulation, and much contact with local authorities. Civil Aviation runs aerodromes and sells services, and for some minds it contained too many " managerial " positions and " plumbing "; but to others who felt unsuited to the administration of statutes it offered the sense of participation in a modern and restless industry. According to this type of general image, each person (at least at higher levels) had his preferences, and in such a Ministry there seemed to be a job to suit any taste.

Some expressed preferences on other grounds, even against their personal tastes. The Assistant Principals were quick to produce analyses of promotion prospects in the two new departments (any Assistant Principal can tell you offhand the dates of promotion and retirement of all the Under Secretaries and Assistant Secretaries in his department, which Principals will get no further than their present rank, who will be next for promotion, and so on): with whatever justice, it was held that the Civil Aviation divisions contained more than their share of " dead wood " in the form of unpromotable officers —Principals and more senior officers who had belied their early promise, and non-direct-entry Administrative Class people. These latter are Principals promoted from the Executive or other class, and on age considerations they are less likely to be promoted. It was rumoured that the Ministry of Supply was in like state, and for its huge size was thought to contain relatively few good First Division officers. Given, then, that promotion in any one department is very much a relative matter, the prospects of a young direct-entry Principal might well appear considerably better in the Ministry of Aviation

than in the Ministry of Transport, where competition had all along been keener.

Finally, in other circumstances people might have applied for transfer because they did not want to change their place of work, especially in the provinces. But the prevailing uncertainty about the ultimate locations of the headquarters of the Ministries inhibited this in London, and it did not arise elsewhere.

Not all requests for transfers could be granted; no one of Under Secretary or higher rank moved out of the post he was occupying. There was, however, a spate of Assistant Secretary transfers, some on request, some on promotion, some into new posts. The grapevine, of course, was humming with information (not always accurate) about who would move where, what reorganisation would take place and how it would affect one, and so on. For most civil servants as persons, it was this sense of stir and excitement and "out of the ordinary" that the reshuffle meant: in this, it was merely an extreme case of a familiar phenomenon, a restructuring of the environment decided above their heads. If it adversely affected their comfort or prospects, they could hope that it might aid their efforts towards efficiency in the work for which they were responsible.

Administrative Consequences

To carry out the Prime Minister's intentions, five statutory instruments were needed, transferring certain of the statutory powers of one Minister to another, not singly but in convenient blocks. Many civil service departments have found it convenient to organise internally on the basis of such blocks of powers; for instance, powers to license road vehicles, powers to control movement of traffic, and powers to construct trunk roads, deriving from different Acts and acquired at different times, are administered within the Inland Transport side of the Ministry of Transport by the respective divisions of Vehicle Regulation and Taxation, Road Traffic, and Trunk Roads. Transfer of powers from one Minister to another thus usually entails transfer of the appropriate units of civil servants accustomed to administer these powers, the smallest such unit usually being the charge of an Assistant Secretary or the equivalent. This is a practical and administrative consequence, however, not a legal one.

Where the powers and their attendant units can be transferred as a going concern, as it were, then little administrative difficulty is met. Where, however, the powers transferred cut across the blocks previously thought convenient, the units cannot simply be transferred as a going concern.

The first Order, the Minister of Aviation Order,[7] transferred to the Minister of Supply the civil aviation functions of the Minister of Transport and Civil Aviation, changed the name of the Minister of Supply to Minister of Aviation, and changed the name of the Minister of Transport and Civil Aviation to Minister of Transport. It was announced to the Ministry of Transport and Civil Aviation by an Establishment Minute of October 20:

> 1. With effect from October 21, 1959, the aviation functions of the Minister of Transport and Civil Aviation will, in accordance with the Minister of Aviation Order made on October 19 under the Ministers of the Crown (Transfer of Functions) Act, 1946, become the responsibility of the Minister of Aviation.
> 2. At Headquarters the posts of Deputy Secretary (Aviation) and Controller of Ground Services, and the following Groups of Divisions, Directorates, etc., will be transferred to the new Ministry of Aviation and the staff will become Ministry of Aviation staff.

(There followed a list of Divisions and Directorates.)

> 3. The following Divisions will also be transferred, and the Ministry of Aviation will shortly indicate their place in the organisation:
>
> Finance Air Division
> Finance Ground Services Division
> Establishment Staffing B Division.
>
> 4. Information will be promulgated later about the effect which the transfer of aviation functions will have on the rest of the Establishments, Organisation and General Group and the Finance, Accounts and Statistics Group. For the time being they will continue to function as at present.

The transfer of functions was a little unreal for the first few days; everyone sat at the same desk in the same room and dealt with the same letters on the same files (except for one of the former Minister's Joint Private Secretaries, who was called to Mr. Sandys' side in Shell Mex House on the morning of October 15 and not seen again in Berkeley Square House). But in quite a short time tangible signs of the transfer began to appear: new file covers, writing paper headed "Ministry of Aviation," Parliamentary Question covers of an unfamiliar colour. One Ministry of Aviation General Notice carried particular conviction of a major change: whereas in M.T.C.A. Assistant Secretaries had controlled Divisions and had the privilege of initialling (rather than signing) minutes, in the Ministry of Aviation Assistant Secretaries did not have that privilege and controlled

[7] S.I. 1959, No. 1768.

Branches (a Division was the charge of an Under Secretary). In M.T.C.A., minutes on file were addressed in the bottom left-hand corner; in Aviation, at the top left of the minute.

The new practices instanced were, in fact, the practices of the former Ministry of Supply. It was apparent to the Civil Aviation staff even at high levels that, whatever the implications of the title, administratively a small organisation was being taken over by a much larger organisation. (Some contrasted the approach with the 1953 negotiated arrangement, each side giving up some of its distinctive and cherished practices, when Transport had merged with Civil Aviation.) Senior civil aviation officials were too service-hardened to let things of this sort disturb them; but indications of loss of corporate identity were clearly resented by more junior staff, especially Clerical Officers: resentment tended to show in coolness of tone on the telephone. Neither side had asked for the change and its consequent upsets, and said so. This situation lasted no longer than it took to establish more personal contacts.

Ironic amusement was caused at a cocktail party given by senior ex-Supply officers to their ex-Civil Aviation counterparts immediately after the formal transfer: one speaker called for a self-denying ordinance on both sides, when as members now of the same Ministry they might read in files originally belonging to the other of the two constituent sections what its officers had had to say about their own decisions. Some might be glad of the convention that criticism of another officer's ability or character is not written.

The two Finance divisions transferred had never dealt with any but civil aviation business, and Establishment Staffing B had had little to do with Transport business. So although their place in the new Ministry, which continued the Supply structure of "decentralised" finance, was somewhat different from the M.T.C.A. pattern, on the whole the split was a comparatively clean one along obvious lines. It was otherwise with the other transfer of functions from Supply to War Office.

The effect of the second of the Orders, the Service Departments Supply (No. 1) Order,[8] was explained in a Ministry of Aviation General Notice of November 9:

> *Transfer of Functions to the War Office*
>
> 1. An Order in Council, the Service Departments Supply (No. 1) Order, 1959, has been made, to come into operation on November 23, 1959. The legal effect of this Order is to restore to the War Office and to the Air Ministry functions (other than

[8] S.I. 1959, No. 1827.

the production and supply of aircraft) which were transferred from them to the Ministry of Supply and the Ministry of Aircraft Production. A further Order in Council will make the restored functions exercisable concurrently by the Minister of Aviation. The legal arrangements have been made in this form because there is no clear-cut boundary between conventional and unconventional weapons, and any attempt to define them legally would have been bound to give rise to difficulties.

2. Detailed discussions are taking place with the War Office on the functions to be transferred.

3. On November 23, the responsibilities of the following named posts together with the branches, sections, etc., reporting to them will be transferred to the War Office, as will also the Establishments, factories, etc., set out below.

(There followed a list of posts, Establishments, and Royal Ordnance Factories.) It was arranged that the staff transferred to the War Office would continue to make use of Ministry of Aviation common services for the time being, as indeed had been done in the other transfer, civil aviation staff using Ministry of Transport common services.

Later General Notices added to the list of posts and Establishments to be transferred. There was implicit in the Prime Minister's decision a logical division of responsibility between the Ministry of Aviation and the War Office: the new Ministry would deal with all aspects of the supply of aircraft; the purely Army or earth-bound supply would be done by the War Office or the Air Ministry. Guided weapons, ballistic missiles, radar and other electronic equipment fitted happily into neither category; but perhaps they were closer in spirit to aviation, and since they had known no other home than the Ministry of Supply they could hardly be " restored " to the War Office or the Air Ministry, so they were to stay where they were, *i.e.*, in Supply under the new name of Aviation. Accordingly a second distinguishing principle appeared, as expressed in the Ministry of Aviation General Notice quoted: between conventional and unconventional weapon systems.

The use of either principle did not, however, settle the appropriate home of, *e.g.*, the Director of Physiological and Biological Research, or the Chemical Defence Experimental Establishment, which might be said to be unconventional enough and yet curiously placed with Aviation. These and others became bargaining counters of a sort, though it should be said that the War Office were not over-anxious to receive such cuckoos in the nest. They may have been somewhat aghast to find their Scientific Officer complement jump overnight from a handful to several thousands, necessitating key transfers of

Establishments men used to handling the special problems of scientific civil servants.

The Ministry of Supply had been going for twenty years against the Ministry of Transport and Civil Aviation's six; and integration—apart from the usual common services—had proceeded further, particularly in certain research fields. The most intractable problem of this sort concerned the field Inspectorate, whose personnel could not be divided into "War Office types" and "Aviation types"; it was decided that for the time being the whole Inspectorate should remain as it was, controlled by the Ministry of Aviation.

This transfer of functions, then, produced a somewhat ragged and unsatisfactory split, more like a tearing apart at some points, with consequent unavoidable damage.

The third of the effecting instruments was a minor one, the Transfer of Functions (Gun Barrel Proof Acts) Order,[9] which transferred to the War Office functions under the Gun Barrel Proof Act of 1868 which had been transferred to the Ministry of Supply in 1947, and the functions conferred on the Ministry by the Gun Barrel Proof Act, 1950.

Fourthly, the Transfer of Functions (Construction of Ships) Order,[10] which came into force on November 3, transferred to the Minister of Transport the Admiralty's statutory functions in respect of merchant shipping. In fact there was little to transfer. The only "power" is a war-time control,[11] of licensing the construction of merchant ships, which is of little significance today but is retained to enable the Government to apply the Western embargo on the export of certain kinds of ships to the Soviet *bloc* and China.

The Admiralty's true functions in respect of merchant shipbuilding since 1945 had been what is known as "official sponsorship." Under the concept of sponsorship the chosen Government Department advises the Government on the state and prospects of the particular industry, and gives to the industry what aid and comfort it can—for example, during the post-war materials and manpower shortages, and now in such things as the extension of credit facilities—even where the industry receives no direct subsidies.[12]

9 S.I. 1959, No. 1828.

10 S.I. 1959, No. 1829.

11 Under regs. 55 and 55AA of the Defence (General) Regulations, 1939 (as set out in the Second Schedule to the Emergency Laws (Repeal) Act, 1959).

12 The Opposition in the House of Commons prayed against the Order, on the grounds that the Admiralty had proved competent whereas the Ministry was a notable failure in both road and rail. Attempts to bring into the debate credit facilities and other "sponsorship" questions were resisted by the Speaker, conceiving the functions to be transferred very narrowly, as being only those mentioned in the Order. Some lawyer-like qualities were, however, displayed on both back-benches and Opposition speakers made their points. 614 H.C. Deb., cols. 463–516, November 25, 1959.

There had been no mention of the marine engineering industry in the Prime Minister's speech, but so closely is it bound up with the other industries that its sponsorship was also transferred.

Merchant shipbuilding, ship repairing and marine engineering were accepted into the fabric of the Ministry of Transport without problems. The Admiralty posted to the Ministry the professional and technical staff engaged on the work, and lent additional staff to help the transition. Otherwise in the Ministry there were few noticeable effects of the reshuffle beside the blocking out on Ministry stationery of the words " and Civil Aviation."

Political Consequences

The last in numerical order and date of these five statutory instruments was the Service Departments Supply (No. 2) Order,[13] which authorised the Minister of Aviation to exercise concurrently with the War Office and the Air Ministry the functions restored to them by the Service Departments Supply (No. 1) Order, thus retaining for the Ministry of Aviation the powers of a supply Ministry. Only this fifth Order (for short the (No. 2) Order) was made subject to affirmative resolution by both Houses of Parliament, the others being made subject to annulment by prayer.[14] The debate on the Government's motion to approve the (No. 2) Order was the first opportunity Members of Parliament had had (or made) to discuss the changes as a whole; the Opposition tabled a prayer to annul the (No. 1) Order, and both motions were taken together on November 12.[15] The Government motion in the House of Lords was down for November 17, but at the request of the Opposition substantive debate was postponed till November 19 to enable the Opposition to table a prayer against the (No. 1) Order in that House also.[16] The Lords debated the subject further on December 14, on a call for papers by Lord Morrison.[17]

These debates in Parliament were of some interest to ex-M.T.C.A. officials, mainly for what was not discussed. The Minister of Aviation (Mr. Duncan Sandys) in his opening speech in the Commons covered

[13] S.I. 1959, No. 1975.

[14] The other four Orders were made under the Ministers of the Crown (Transfer of Functions) Act, 1946, ss. 1, 2; but the (No. 2) Order was made under the Ministry of Supply Act, 1939, s. 3, and s. 6 of that Act requires Orders in Council made under it to be subject to affirmative resolution.

[15] 613 H.C. Deb., cols. 657–675.

[16] 219 H.L. Deb., cols. 608–617; 754–782. These Prayers against the (No. 1) Order were procedurally desirable: if not taken before the positive approval of the (No. 2) Order, they could still have been tabled for some twenty days afterwards under the 40-day limit, and if successful might have led to an awkward situation, since the (No. 2) Order is so clearly dependent upon the operation of the (No. 1) Order and the Minister of Aviation Order. The point was made by Lord Wilmot in the Lords Debate on November 17.

[17] 220 H.L. Deb., cols. 338–366.

the ground of the three main Orders in Council,[18] referring to the speech of the Prime Minister that has been quoted at the beginning of this article. He anticipated the keynote of the Opposition's attack, however, when he remarked that the Orders would bring about the end of the Ministry of Supply; for the debate was about supply arrangements for the Forces, including the role and possible role of the Ministry of Defence, a familiar hobby-horse. In the Lords, the same thing occurred in both debates on November 19 and December 14; the history of the setting up of the Ministry of Supply and of the Ministry of Aircraft Production was rehearsed, and it was the efficiency of Generals and Air Marshals as producers, the possibility of failure of co-ordination where Ministry of Aviation missiles had to be fired from Navy submarines, and the like questions, which gave rise to the misgivings forcibly expressed. Members had many questions about precise placing of responsibility, and the new arrangements were described as a "dog's breakfast" and a "half-baked compromise."

Mr. Sandys agreed that the new arrangements for supply to the Forces were untidy, but went on:

> "However, I think the criticism that is made arises from the fact that, perhaps, Hon. and right Hon. Members making this criticism are looking at it from a standpoint different from that from which the Government have approached it. If Service procurement had been the sole or overriding consideration, either of those two courses proposed by the right Hon. Gentleman [Mr. Strachey], which are more logical and more tidy, might have been adopted. But I say quite frankly that the reorganisation of military procurement is not the main reason for this change in the distribution of Ministerial responsibilities. The principal reason for creating the Ministry of Aviation is to enable the interrelated problems of the aircraft industry and the airlines to be tackled together by a single Minister." [19]

It was desirable at this critical time for the aircraft industry, he said, that one Minister be able to concentrate all his attention upon these problems, without being distracted by shells and boots. He saw no reason why the changes should reduce the efficiency of the supply system, and ended by asking the House to look at the changes not in the light of the reorganisation of supply arrangements but rather in the light of the urgent need for overall consideration of the aircraft and air transport industries. One got the impression that the

[18] Nothing was said in Parliament about the Gun Barrel Proof Acts, and the Construction of Ships transfer was the subject of a separate debate on November 25; see p. 159, n. 12, *supra.*

[19] 613 H.C. Deb., col. 672.

Opposition felt that the Government was evading the charge, while the Government felt that the Opposition was missing the point.

Although no one in either House put it in these words, the debate was one on the Machinery of Government, with the two sides giving different priorities to a "clientele" and to a "process" basis of organisation. If you put all the aeroplane men in one group (and similarly all the merchant navy men), you cannot at the same time collect all the supply and research men into another group. It is a classic dilemma.

To some interested civil servants it was noticeable that one result of the changes was hardly mentioned in Parliament. The reshuffle meant the end of another Ministry, the subject of this article. The 1953 merger of Transport with Civil Aviation was a logical enough step which had offered a plausible hope of the integrated planning of all civil transport. It was generally agreed that this had not happened: no fundamental road/rail/sea/air policy had emerged, possibly because no such thing is really feasible, or because it is not feasible under a Conservative government in a mixed economy. Even at the day-to-day level there had been little interaction between the Inland Transport, the Shipping, and the Civil Aviation sides of the Ministry; small points of contact, such as the problems of highways crossing airfields, were handled almost in an interdepartmental spirit. In the organisation chart of the Ministry of Transport and Civil Aviation the organisation charts of the three formerly separate constituent Ministries were still quite clearly visible, side by side, self-contained and ruled by a Deputy Secretary: the three regional office organisations, often with offices in the same town, remained quite separate.

It is perhaps not surprising that some Civil Aviation officials held the opinion at this early stage that the value of organisational association between civil aviation (oversight of airline corporations, route licensing, safety regulation, running of airports and air traffic control) and the aviation side of Supply (specification, development, and procurement of military aircraft and equipment) would turn out to have been similarly overestimated. Others who had come much in contact with Ministry of Supply experts in the past, on interdepartmental committees and projects, hoped for closer co-ordination; in considering, for instance, the effect of aircraft design upon airport design and costs (aircraft noise, runway length, passenger handling), the airport operator might now be brought in at the beginning—at least so far as British aircraft are concerned.

More generally, some officials questioned whether a single Minister ought to speak for both producer and consumer in the same industrial field. In these changes, this had been done in two fields, shipping

and aviation [20]: but a distinction was drawn between them. In the first, both producer and consumer were in the private sector, and Government had no dynamic policy for either, the Department's main role thus being sponsorship; in these circumstances valuable consultation might take place via the Ministry which would not happen were the sponsoring Departments separate. In the second, however, the main consumers of civil aircraft in this country are the airline public corporations, for whose general conduct the Minister answers in Parliament; the producers are almost entirely in the private sector. In a period when the role of the Ministry towards the manufacturers is mere sponsorship, the closer interest of the Minister in the airlines may lead to inadequate representation of the manufacturers at Ministerial level. In a period when the Government has a definite policy in the manufacturing field, its desire for the success of this policy, coupled with the Minister's influence over the airlines, may result in the consumer having a particular product forced down his throat, with no adequate means of protest at Ministerial level.

In either case, decisions which would better be a matter of debate, if not in public then at least between two interested Ministers, may be taken within a single Ministry on a basis of predetermined Government policy, which is a risky proceeding when the issues are so important, the financial implications of even a single transaction so great. However, the argument becomes not solely organisational but also constitutional, concerned with the reality of Ministers' accountability to Parliament and of the independence of public corporations.

Epilogue

The last of the Orders in Council took effect on November 23, 1959, six weeks after the initial announcement. Transfer of records, libraries, and the like took place early in 1960. There were some physical moves to be made: St. Christopher House received the Highways Administration staff late in 1960, and the rest of the Ministry of Transport and some of the staff of the new Master General of the Ordnance (ex-Supply) moved there in early 1961, the room left by the latter in Shell-Mex House being occupied by civil aviation staff from Berkeley Square House, which has been evacuated. As for Hemel Hempstead, it has received the entire Accounts Branch of the Ministry of Transport (at some inconvenience to headquarters) instead of a proportion of M.T.C.A. Accounts, thus filling the accommodation, discharging the commitment under the Government's dispersal policy,

[20] It is found also in the Ministry of Power (coal producers, gas and electricity coal consumers), and several times over in the Ministry of Agriculture, Fisheries and Food, in the Board of Trade, and in the Ministry of Works, where the Ministry itself is a consumer as well as sponsor of some producers.

and ensuring that no one who had arranged for housing there need disturb the arrangement.

Though the " new " Departments may not yet have settled down physically, their psychic personalities, as it were, are once more whole (though they will never be the same men again). The amputation and grafting scars have healed over, and blood is circulating more or less naturally. Some who have been moved think the tea better, others not.

THE PREROGATIVE POWER OF DISSOLUTION: SOME RECENT TASMANIAN PRECEDENTS

ENID CAMPBELL

CONSIDERABLE attention has been lavished upon the collection of Commonwealth precedents relating to the exercise of the prerogative power of dissolution of elective Houses of Parliament and upon the rules or conventions which have been created, or are in the process of being created, by such precedents. The preponderance of opinion now supports the view that although the power must be exercised by the Sovereign or her representatives upon advice, *i.e.*, that responsibility for dissolution or its refusal must be assumed by Ministers, there is no " duty " to grant dissolution automatically upon request. Opinions do differ, however, about the circumstances in which the Sovereign or her representatives are " entitled " to reject ministerial advice to dissolve and to commission the formation of an alternative ministry, or, if that is impossible, to require the existing government to continue in office. Dr. H. V. Evatt and Dr. Eugene A. Forsey [1] have collated a number of Commonwealth cases in which Governors General, Governors and Lieutenant Governors have rejected advice to dissolve. The former's interpretation of the precedents is not always explicit and his whole analysis is coloured by the conviction that: " It is not certain to what extent, and under what considerations, the Sovereign or his representative possesses the right to refuse a dissolution of Parliament to Ministers." [2] Dr. Forsey, on the other hand, has been far less reluctant to distil " rules " regarding the circumstances in which it is proper and improper to refuse requests for dissolutions.

The three Tasmanian precedents to be discussed here do not go very far in resolving present uncertainties or in suggesting how the prerogative power is likely to be exercised in Tasmania in the future.[3] They do, however, illustrate the special difficulties which arise in a two-party system in which unstable majorities are the rule rather than the exception, and the onerous responsibility which is borne by the Governor in deciding whether to accept or reject the advice of

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1 H. V. Evatt, *The King and His Dominion Governors*, London, 1936; Eugene A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, Toronto, 1943.

2 Evatt, *op. cit.*, p. 286.

3 The prerogative power is clothed in statutory form; see the Constitution Act, 1934, s. 12 (2). The Legislative Council is not subject to dissolution.

his Ministers. The main questions which were raised by the requests for dissolution in 1950, 1956, and 1959, were: (1) whether it is proper for the Governor to grant a dissolution to a Premier who apprehends defeat on the floor of the House but before the defeat is actually suffered; (2) whether it is proper for a Governor to reject his Premier's advice to dissolve and to commission the Leader of the Opposition to form a government when it is manifestly clear that the alternative Ministry would have to rely on support from a renegade member of the Government party; (3) whether it is proper for the Leader of the Opposition when consulted by the Governor on the possibility of forming an alternative Ministry to advise the Governor whether or not he should grant a dissolution.

Before outlining the events which preceded the granting of dissolutions in 1950, 1956 and 1959, three incidental matters might be mentioned. Upon every request for a dissolution the Labour Premier has submitted that it is only in extreme circumstances that the Governor is entitled to reject the Premier's advice to dissolve. Little indication has been given of what those circumstances might be. Although in each instance the Governor has granted a dissolution he has expressly stated that his decision does not imply acceptance of the above submission. Secondly, it has been recognised implicitly by all parties concerned that the grant of a dissolution is dependent upon supply having been granted to the Government for the period which would elapse before the meeting of the new Parliament. And thirdly, it appears to have been recognised that the Governor is entitled to seek advice from the Chief Justice and the Solicitor-General, both of whom are non-political officers, on any legal issues which may be involved.

The Dissolution of 1950 [4]

At the general elections for the House of Assembly held in August, 1948, the Labour Government was returned to office with a majority of three seats over the Liberal Opposition, the remaining three seats being won by Independents. The appointment of a Labour Speaker left the Government in the position of having to rely on the support of at least one Independent to maintain a majority on the floor of the House. For a year the Government suffered defeat or near defeat on several Bills.

Its position was slightly improved when, following the death of the Speaker in September 1949, one of the Independents, Mr. W. G. Wedd, accepted the Speakership. In January, 1950, Mr. Wedd resigned in protest against a Government appointment, and

[4] See Parliamentary Paper No. 10 of 1950.

apprehending a return to the unsatisfactory situation which had existed between August 1948, and September 1949, the Premier requested the Governor, Admiral Sir Hugh Binney, to dissolve the Assembly.

At the time the Premier's advice was tendered, the Assembly was still in recess and there had been no formal vote on any major Bill. However, it was the Premier's contention that in so far as the Government would be obliged to supply a Speaker, it was inevitable that the Government would be left without a majority and that in these circumstances it was the Governor's constitutional duty to grant a dissolution.

The greater part of the Premier's letter of advice was devoted to the argument that the Governor had no alternative but to accept and act upon the Premier's advice and that the conventions governing the exercise of the prerogative power of dissolution by the monarch were equally applicable to His Majesty's representatives in the Australian States. The latter question resolved itself into the applicability of the resolution of the Imperial Conference, 1926, that the Governors General of the Dominions held " in all essential respects the same position in relation to the administration of public affairs in a Dominion as is held by His Majesty, the King of Great Britain." Adopting the opinions set forth by Dr. H. V. Evatt in *The King and his Dominion Governors*, the Premier submitted that no distinction could be drawn between the position of the Governor General in relation to his Ministers and the position of the State Governors in relation to their Ministers, and that, in particular, the State Governors were no longer agents of the Imperial Government.[5]

Having sought to equate the position of the Governor to that of the Governor General and the King, the Premier argued that the Tasmanian Governor should be guided by the principle that he, like the Governor General, is—

> required to act on the advice of his Ministers in the matters of dissolution and dismissal, and would have the right to disregard such advice only in those cases where the King himself would be accorded that right by constitutional usage in the United Kingdom.

In submitting that in circumstances such as those which had now prompted the Premier to advise dissolution, the King would be duty-bound to accept his Prime Minister's advice to dissolve, the Tasmanian Premier appears to have relied less upon original British precedents or upon the opinions of recognised British constitutional authorities,

[5] Evatt, *op. cit.*, Chap. XXII.

than upon the interpretation which had been placed upon British conventions and practices by the Governor General of Australia, Sir Isaac Isaacs, on the occasion of the dissolution of the House of Representatives in 1931. In reply to Labour Prime Minister Scullin's request for dissolution, the Governor General had said that it was his "duty in existing circumstances to accept the advice tendered. . . ." [6]

Whether or not Sir Isaac Isaacs' interpretation of British conventions was correct or not his reply does not support the contention that the Governor General has no discretion in exercising the power of dissolution. For one thing he cited with approval Keith's opinion that if after one unsuccessful dissolution the Governor General was requested by his Ministers to grant another, he would be bound to refuse.[7] Further, it is clear that Sir Isaac Isaacs regarded it as his duty to accept Mr. Scullin's advice, only once he had satisfied himself that the circumstances warranted a dissolution. In this instance the circumstances considered by the Governor General were " the strength and relation of various parties in the House of Representatives, and the probability in any case of an early election being necessary." [8] But having satisfied himself that there were " considerations in the known circumstances which . . . [tended] to support the acceptance of the advice tendered to " him, Sir Isaac Isaacs apparently thought that his duty did not permit him to test the possibility that an alternative Ministry might be found. In this respect he was merely adopting the conclusion advanced by Keith that convention demanded that a Governor General " should, save in extreme circumstances, accept the advice of his Ministers, as readily as did the King in 1924, when he dissolved Parliament at the request of Mr. Ramsay MacDonald without trying to find an alternative government." [9]

Dr. Evatt's comment on Sir Isaac Isaacs' action was that although it was impossible to describe it as unwarranted, the Governor General " would certainly have been justified in getting in touch with the other party leaders. . . ." [10] Generally speaking, Dr. Evatt's analysis has found favour with the Tasmanian Labour Premiers, but on this

6 Commonwealth of Australia, *Parliamentary Debates*, Vol. 132 (1931), p. 188 *et seq.* The Prime Minister's request for dissolution followed the carrying of an adjournment motion introduced by the leader of a breakaway group of Government members.

7 See A. Berriedale Keith, *Dominion Autonomy in Practice*, London, 1929, p. 5.

8 Evatt (*op. cit.*, p. 237) noted that: " The factors in the parliamentary situation not already referred to were that the House of Representatives had run two years of its normal period of three years, that, in any event, it was necessary that an election for eighteen of the thirty-six senators should be held early in the year 1932, and that it was agreed on all sides that, in order to prevent waste of public money, the House of Representatives should be elected at the same time as the Senators."

9 Keith, *op. cit.*, p. 5.

10 Evatt, *op. cit.*, p. 237.

matter of consultation by the Governor with Opposition leaders, the Isaacs view appears to have prevailed. Possibly in anticipation of the Governor exploring the possibility of an alternative Ministry, the Premier in 1950 advised him that there was no prospect of such a Ministry being formed, but in so doing he obviously conceded that it was proper for the Governor to make inquiries of the Leader of the Opposition.[11]

It emerged, however, that before he decided to act upon his Premier's advice Governor Binney did confer with the newly elected Leader of the Opposition and that the request for dissolution was granted only when the Governor had " first (by an interview with the Leader of the Opposition) satisfied himself that no alternative government was possible." In a carefully worded reply the Governor made it very plain that he did not accept the Premier's version of the conventions applicable to the exercise of his power of his dissolution and that in no circumstance would the grant of dissolution be automatic upon request.

The only reason given by the Governor for granting the dissolution was what he termed " the parliamentary situation." As far as the state of the parties was concerned the parliamentary situation was no different from that immediately following the general elections of 1948. That the Government would have had to supply a Speaker certainly would have deprived it of its majority on the floor of the House, but it needs to be noted here that in Australian Parliaments the exercise of the Speaker's casting vote in favour of the Government is not considered an improper use of the Speaker's presidential position.[12] Moreover, there was no escaping the fact that despite the record of defeat or near defeat between August 1948 and September 1949 the Government had not been defeated on the motion of censure. Without going so far as to submit that he would have been entitled to a dissolution at any time during this unstable period, the Premier explained to the Governor that his Ministry had carried on despite rebuffs because in the national interest it had felt obliged to do so, because a further election within a year of the 1948 general elections was unlikely to produce a different result and because there were matters requiring the urgent attention of Parliament.

11 In advising the Governor to grant a dissolution in 1956, this course was acknowledged as permissible.

12 On the partisan characteristics of the Speakership see " Report of Board of Inquiry on Deadlocks in the House of Assembly," *Journals and Printed Papers of the Parliament of Tasmania, 1951–52*, Paper No. 6, and F. C. Green (ed.), *A Century of Responsible Government, 1856–1956*, Hobart, 1956, pp. 26–27.

The Dissolution of 1956 [13]

That the mere possibility that an alternative Ministry might be formed would not necessarily induce the Governor to refuse a request for dissolution became apparent in 1956 when another request for dissolution was made by the Labour Premier. In this instance the request was precipitated by the fact that the Minister for Housing crossed the floor to vote with the Opposition on a motion of no-confidence, thereby depriving the Government of its majority. At the general elections of 1955 fifteen Labour and fifteen Liberal members had been returned, and by reason of its having obtained 82,363 primary votes as against the 70,959 votes of its opponents, the Labour Party was declared, under the 1954 deadlocks legislation, to be the majority party and as such entitled to an additional member should it elect the Speaker. In the event, the Liberal Party appointed a Speaker from its ranks, thus giving the Labour Party a majority of one until the defection of the Minister for Housing.

In advising dissolution the Premier incorporated portions of the advice tendered in 1950 but elaborated in greater detail the authorities which "compelled" the Governor to accept and act upon his advice. Interestingly enough, the only precedent cited in support of this view was the 1931 dissolution of the House of Representatives. Those passages cited from the works of Keith, Anson and McGregor Dawson were carefully selected extracts which asserted that dissolution was a weapon of party discipline, that its refusal was justified only in extreme circumstances and that refusal was exceptional.[14] The contrary opinion of Dr. Forsey that dissolution is an exceptional remedy[15] was discredited as being based on analysis of the precedents which made no distinction "between the periods at which the precedents occur. . . ." According to the Premier, Dr. Forsey's way of thinking was "far closer to the eighteenth century than to the reign of Her present Majesty." One may be permitted to observe of this assessment that it overlooks the fact that Dr. Forsey gave some thought to the question of whether Governors General, Governors and

[13] "Papers Relating to Dissolution of the House of Assembly," *Journals and Printed Papers of the Parliament of Tasmania, 1956*, Paper No. 59. Extracts from these papers appear in "The Australian States and Dominion Status" (1957) 31 Aust. L.J. 42–45.

[14] The authorities cited were Chalmers and Hood Phillips, *Constitutional Law*, 6th ed., pp. 51, 52; Sir William Anson, *Law and Custom of the Constitution*, Vol. II, 4th ed., Oxford, 1935, pp. 9–12; Sir A. Berriedale Keith, *The Constitutional Law of the British Dominions*, London, 1933, pp. 104, 169; R. McGregor Dawson, *The Government of Canada*, pp. 392, 393; Jennings, *Cabinet Government*, 2nd ed., London, 1951, pp. 317–318; L. F. Crisp, *The Parliamentary Government of the Commonwealth of Australia*, Melbourne, 1949, p. 229.

[15] Forsey, *op. cit.*, p. 256 *et seq.*

Lieutenant Governors had at any time acted contrary to United Kingdom practice and found very few cases where they had.[16] Moreover, the Premier did not take exception to the fact that Sir Ivor Jennings, whom he quoted with approval, had based his analysis largely on nineteenth-century precedents.

Curiously enough, the Government believed that Dr. Evatt's criticism of the assertion that Prime Ministers have a right to dissolution upon request was tacit affirmation of that right.[17] Admittedly Evatt stated that: "The mere fact that some sort of alternative Ministry is possible does not, and should not, prevent the grant of a dissolution by the King's representative," [18] but to infer from this or even from his other observations on dissolution that Evatt subscribes to the dissolution-as-of-right school falls little short of wishful distortion.

One further comment needs be made on the Premier's survey of authorities, namely his rejection as irrelevant of pre-1926 Dominion and Colonial precedents. In his letters of advice in 1950 and 1956 the Premier devoted, as has been indicated, considerable space to the change in status of the State Governors, seemingly on the assumption that as Imperial agents the Governors were guided by different conventions regarding the exercise of the power of dissolution from the conventions governing the exercise of the same power by the monarch. Sir Isaac Isaacs made the same assumption in 1931 but there is little evidence that prior to 1926 Dominion, State and Provincial Governors enjoyed by convention greater discretionary powers in relation to the exercise of this particular prerogative than after this date.

It is true that prior to 1926 requests for dissolution of the Tasmanian House of Assembly had been refused on several occasions, namely in 1879, 1904, 1909, 1914 and 1923. Further, in 1877 Governor Weld in a dispatch to the Secretary of State for the Colonies had said that:

> ". . . in all cases the representative of the Crown should be more careful in granting a dissolution than the Crown might be in England, as he must sometimes be advised by Ministers not sufficiently determined to waive small party advantages, somewhat accustomed occasionally to the sledge-hammer style of political warfare and not uniformly imbued with that constitutional knowledge and spirit which often seems hereditary and is generally inherent in British Statesmen." [19]

[16] *Ibid.*, p. 4.
[17] The passage referred to appeared in Evatt, "The Discretionary Authority of Dominion Governors" (1940) 18 Can.B.R. at p. 8, and was reproduced in Forsey, *op. cit.*, p. 10.
[18] *Ibid.*, p. 9; quoted by Forsey, *op. cit.*, p. 10.
[19] Cited by Evatt, *The King and his Dominion Governors*, p. 223.

Whether Governor Weld's attitude was shared by his successors is not known for none of the later refusals of dissolution were predicated explicitly upon the above considerations. The refusals of dissolution in 1879, 1904 and 1909 were based in part upon the short lapse of time since the last elections and upon the belief that further elections would not produce a different result.[20] The latter consideration is nowadays regarded as an improper one for a Governor to entertain, but, on the other hand, given a parliamentary situation in which party lines are more fluid than they are today and less affected by great differences in policy, it is impossible to say with assurance whether a Governor of the 1960s would act differently.

From the point of view of modernity, the precedents of refusal in 1914 and 1923 are of more importance.[21] The fact that in 1914 the Governor's acceptance of an offer by the Leader of the Opposition to form an alternative Ministry on the condition that the latter should advise dissolution prompted the Secretary of State for the Colonies to direct the Governor that the imposition of the condition was improper, lends support to the view that at this time the Governor was still an Imperial agent. It does not, however, unequivocally support the view that the rules governing the exercise of the power of dissolution were any different from those applying in the United Kingdom. Indeed, the directive from London is evidence that the Imperial authorities were endeavouring to ensure uniformity of practice. Both the Premier, who advised dissolution in 1914, and the Administrator, who refused a dissolution in 1923, were agreed that refusal was justified when the existing Parliament could support an alternative Ministry. Would such admissions in themselves suggest that the conventions regarding the power of dissolution differed as between Tasmania and the United Kingdom? In 1923 Mr. Asquith stated " that the Crown is not bound to take the advice of a particular Minister to put its subjects to the tumult and turmoil of a series of General Elections, so long as he can find other Ministers who are prepared to give it a trial."[22] A year later the King granted a dissolution to Mr. Ramsay MacDonald from which Keith concluded that it was the King's duty to grant a dissolution upon request " without even considering whether the Government could be carried on without a dissolution. . . ."[23] As Evatt has rightly pointed out,[24] Keith was not in a position to say whether the King may or may not have considered the possibility of an alternative Ministry. If the Asquith view can be taken as an orthodox statement of United Kingdom practice, then what evidence is

[20] See Forsey, *op. cit.*, 31–35.
[21] *Ibid.*, pp. 34–35; Evatt, *op. cit.*, Chap. IV.
[22] Cited by Evatt, *op. cit.*, p. 65.
[23] Keith, *Responsible Government in the Dominions*, Vol. I, London, 1928, pp. 147–148.
[24] Evatt, *op. cit.*, p. 66.

there to prove that the refusal of a request for dissolution of the Tasmanian Assembly in 1923 was based upon rules which were peculiar to colonial legislatures?

Precedents and authorities aside, what were the circumstances indicated by the Tasmanian Premier in 1956 as justifying an appeal to the people? A Minister of the Crown had defected from both the Labour Party and the Ministry and had joined forces with the Opposition on a motion of no-confidence. In resigning from the Party and the Ministry the Minister had stated that his reasons for so doing were " not any difference on major policy but differences with his colleagues on the administration of his department and with his Party on methods of party discipline." Henceforth " he would sit on the cross-benches and vote according to his conscience." The Minister, so it was suggested, had acted in flagrant disregard of his pledge to his electors [25] and to allow an alternative Government to be formed on the strength of this breach of duty would be to override the principle that a Government governs by reason of the mandate given it by the electors. There was no reason to suppose that the electors had withdrawn the mandate they had given eighteen months before, no reason to suppose that the Government had lost public confidence.

Support for the Government-by-mandate thesis was sought by the Premier in the 1954 constitutional amendment according to which the party obtaining a majority of primary votes would be entitled to govern notwithstanding that its representation in the Assembly was the same as that of the minority party. No explicit provision had been made in the 1954 amendment for the contingency of changes in party allegiance, and in the Premier's opinion, for the purposes of the deadlocks legislation, the defecting Minister would still be regarded as a member of the majority party since he was included in the Electoral Commissioner's list of majority-party members. From the provisions in the amendment for the reduction of the life of the Assembly to three years the Premier drew the inference: " that there should be an earlier dissolution when the Government [the amendment] was designed to sustain would otherwise be overthrown by a change for which it makes no provision."

Yet another argument in favour of dissolution was that under the Tasmanian system of proportional representation, members were elected " to represent view, policies and parties." Hence, a member who changed his allegiance in mid-stream tended " to defeat the Constitution and defraud electors of their right to be represented by the

25 But does resignation from a party with whose methods of discipline a member does not approve signify disregard of the member's pledge to his electorate? It may well be that notwithstanding his resignation from the party a member might continue to fulfil his promises to his electorate, in which event the Premier's argument would lose some of its cogency.

group they voted for. . . ." The implication may be drawn from the Premier's letter of advice that the defecting Minister's proper course of action should have been to resign his seat. By resigning his seat a member of the Assembly in Tasmania cannot ask his constituents for approval of his change of heart, for vacancies are filled not by by-elections but by a recount of the ballot papers of the member whose seat has become vacant. Normally the distribution of preference results in the election of a member of the same political party.

Without expressing any firm view on the Premier's submissions regarding the effects of the Tasmanian constitutional structure upon the exercise of the power of dissolution, the Governor, Sir Ronald Cross, decided that it was " proper in all the circumstances that the electorate should have an opportunity of expressing its will," notwithstanding that the Leader of the Opposition had given an assurance that he had the support of a majority of members of the Assembly. It would therefore seem that it was the Governor's view that, given an Assembly in which the voting strength of the two parties was equal or nearly equal, the choice of the Government should rest with the electors. The Governor's action can in no way be construed as affirmation of the Isaacs view on the exercise of the power of dissolution, for as did Governor Binney in 1950, Sir Ronald Cross expressly stated that his decision did not imply acceptance of the Premier's submission that it is only in extreme circumstances that the Governor is entitled to reject his Premier's advice. On the other hand, the decision to grant a dissolution notwithstanding the assurance of the Leader of the Opposition may be interpreted as acceptance of the Premier's submissions regarding the impropriety of allowing an alternative government to be formed on the strength of the defection of a Government member, particularly when it was apparent that the alternative government would require its new supporter to vote for measures designed to upset legislation passed by the previous Government. Since the change of heart of the Minister was explained as disagreement with methods of party discipline and not with policy, the appeal to the electorate was as much a test of the electors' attitude towards party discipline as of party popularity.

The most controversial aspect of the 1956 dissolution was the unsolicited advice tendered to the Governor by the Leader of the Opposition. In a letter bearing the same date as the Premier's letter of advice the Leader of the Opposition assured the Governor that he had the support of a majority of members of the Assembly and that a Ministry under his leadership would have the support of the Assembly for the remainder of its term. More significant was the submission that having suffered a vote of no-confidence the Premier had " forfeited his constitutional authority to advise the Crown."

While the Premier could "*ask for* dissolution," he no longer had "authority to *advise*" the Crown. It was the Governor's duty, in the circumstances, the letter continued, to refuse any dissolution requested by the Premier. The nature of the Governor's duty was, so it was contended, clearly indicated by the Tasmanian precedents of 1914, 1923 and 1950.

Apparently well aware of the inferences which the Premier had drawn from the Assembly deadlocks legislation, a considerable part of the Leader of the Opposition's letter was taken up with refutation of the suggestion that the deadlocks provisions affected the conventions governing the exercise of the Governor's reserve powers. Perhaps more important was the thesis advanced concerning the relevance of the defection of the Labour Minister. The theory of representation propounded by the Premier was emphatically denied in words which might have been uttered by Edmund Burke. "Nothing," it was said, "is clearer in the British system of parliamentary democracy than that the Member of Parliament is not a delegate; but that when elected he is in Parliament to exercise his own judgment, having due regard for the wishes of his constituents." The Premier had described the actions of the Minister for Housing as "constitutionally improper." Far from being improper, the Leader of the Opposition termed it as an assertion of the "fundamental right of the individual member."[26]

Strong objection was taken by the Premier to the Leader of the Opposition's action. While conceding that the Governor had a right to inquire from the Leader of the Opposition whether he was in a position to form an alternative Ministry, he submitted that if, as the Press had reported, the latter had advised the Governor against accepting the advice of his Ministers, such conduct "would involve a breach of the confidential relation which should always exist in this as in all other matters between the representative of the Crown and his constitutional Ministers." The Premier went on to say that there would be no objection to the Governor consulting the Chief Justice on legal issues, or alternatively, the Solicitor General, for which courses there were precedents, but there was no precedent for an Opposition tendering advice of any kind.[27]

[26] The Leader of the Opposition also drew the Governor's attention to Lord Shaw's speech in *Osborne's Case* [1910] A.C. 111.

[27] If the Governor had solicited an opinion from the Leader of the Opposition, the case, it is submitted, would have been no different. For then, there appears to be little practical difference between an Opposition leader submitting a gratuitous opinion and an outsider publishing in a newspaper, which must surely come to the Governor's attention, an opinion which is opposed to the Premier's advice. In 1926 and 1927 Keith "intervened" in the New South Wales dispute concerning the exercise of the Governor's reserve powers by publishing two letters in the *Scotsman*. On the question of outside advice see Evatt, *op. cit.*, pp. 130–131.

At this stage the Premier was not in possession of a copy of the Leader of the Opposition's letter to the Governor and his only information appears to have been derived from a newspaper report that the Leader of the Opposition had called upon the Governor and had presented a case against the granting of a dissolution. There is no indication in the printed papers whether the Leader of the Opposition was actually invited by the Governor to tender advice or to inform him whether he was able to form a Ministry. The probability is that the Leader of the Opposition was summoned for the latter purpose only and that the case against dissolution was presented to the Governor without invitation and without any prior indication that such advice was to be tendered.

The Dissolution of 1959[28]

Early in 1959 the Labour Government took the unprecedented step of ostracising one of its own members from the Ministry. Having declined to follow the normal practice of resigning from the Cabinet, the Treasurer was formally dismissed from the office by the Administrator on the advice of the Premier.[29] The dismissal was followed by an announcement on the part of the ex-Treasurer that he would resign from the Labour Party and henceforth act as an independent member. The immediate result was to place the Government in the position of being deprived of its majority of one on the floor of the House. When on April 8, 1959, the Premier advised the Administrator to dissolve the House, the ex-Treasurer had not had occasion to vote on any issue and the Government had not been defeated. The Premier nevertheless advised that dissolution was " necessary to preserve the discipline on which the party system is based." While conceding the " difference between the advice of a Premier with a sure majority in the House of Assembly and one who is facing, or has met, defeat in the House," the Premier submitted that in the present circumstances it was of no great importance that his Government was in a precarious position. Though his reasoning was far from clear on this point, one may surmise that his contention was that his advice was as compelling as it would have been if tendered before the Treasurer's dismissal for the reasons that the Government still held the mandate of the people and that the popularity of the Labour Party was in no way affected by the resignation of a Labour member from the Party.

A further reason given for advising dissolution was that the state of public business required the Governor to have Ministers

[28] " Papers relating to the dissolution of the House of Assembly, April 9, 1959," *Journals and Printed Papers of the Parliament of Tasmania*, 1959, Paper No. 6.

[29] For a commentary on the dismissal see R. P. Roulston, " Dismissal of Ministers of the Crown: A Tasmanian Precedent " (1959) 1 *Tas.Univ. Law Rev.*, 280–288.

commanding the confidence of the Assembly as soon as possible. Here the Premier was referring to the Premiers' Conference scheduled to be held at the end of May or thereabouts and to "the need to give effect to a Federal conference on uniform laws to control hire-purchase." In granting a dissolution it was this factor and the fact that general elections would have to be held in any event before the expiration of the present House of Assembly in October, that weighed most heavily with the Administrator.

The Administrator's reply to the Premier is noteworthy in at least two respects. First, the Administrator at the time was also the Chief Justice and at the time of the 1956 dissolution had been the Solicitor General. Secondly, the Administrator explained that had the Premier's sole reason for requesting dissolution been an anticipated defeat of the Government he would not have thought it proper to grant a dissolution. In saying this the Administrator may have meant that had he been in the Governor's position in 1950 he would not have granted a dissolution until such time as the Government actually had been defeated. In taking this stand the Administrator may have had in mind Forsey's opinion:

> "... that a Government is not in any case entitled to a dissolution as 'undefeated on critical divisions,' merely because an impending critical division has not taken place. If a motion of censure or want of confidence is under debate but has not yet been voted on, and the Cabinet tries to forestall a probable or even possible defeat by asking for dissolution, then it is clearly the Crown's duty to refuse." [30]

Conclusions

That the Tasmanian Governor may reject his Premier's advice to dissolve the House of Assembly and commission an alternative Ministry has now been acknowledged as permissible, but there has been no unequivocal acknowledgment by the Governor that it would be constitutionally improper for him to commission an alternative Ministry whose majority was dependent upon a former member or members of the government party, or which lacked popular support. The fact that in 1956 the Leader of the Opposition intimated that he could form a government and that the Governor preferred to grant a dissolution does not, it is submitted, warrant the conclusion that the Governor accepted the alleged impropriety of commissioning a Ministry which would be "dependent upon the support of members who were proposing to act in flagrant disregard of their pledges to the electors."

[30] Forsey, *op. cit.*, p. 263; also p. 146 *et seq.*

With Dr. Forsey, the author would agree that Dr. Evatt's view regarding the factors which the Crown should consider in determining whether to commission an alternative Ministry " would seem to be very difficult of application."[31] Whether an alternative Ministry would have popular mandate, or whether any member or members supporting it would have to compromise their electoral pledges, are questions which a Governor cannot resolve without venturing himself into the political foray. Party realignments which result in the defeat of a government may be equally consistent with fulfilment of election pledges as with their breach.

According to democratic theory, governments are supposed to execute the will of the people, but under the British system of democracy, Parliaments are also expected to provide stable majority governments. Some sacrifice of the former principle may be required in the interests of the latter. On balance Dr. Forsey has given greater weight to the latter, for which reason he has been led to the conclusion that the only times when an alternative Ministry should not be appointed are when there is " some great issue of public policy at stake " or where Parliament is approaching the end of its life through efflux of time.[32] The second situation was certainly a factor in the Tasmanian dissolution of 1959; the dissolution of 1956 involved neither. This writer prefers the view that this dissolution was a prudent decision dictated principally by the realisation that the majority of the alternative Ministry would be as precarious as that of the government and that the holding of an election might conceivably produce a wider margin between the parties.

Although not specifically rejected by the Governor, the contention put forward by the Leader of the Opposition in 1956 that having suffered defeat the Premier had forfeited his authority to advise the Governor, was implicitly rejected in the Governor's reply in that it was there stated that " due weight " had been given to the advice tendered by the Premier. No view was expressed on the Premier's submission that it was improper for the Governor to surround himself with two sets of advisers and in particular, to consider advice tendered by the Leader of the Opposition. There can be no doubt that the contention that the Premier had forfeited his authority to advise the Governor was wrong, but once it is conceded that the Governor may consult with the Chief Justice and the Solicitor General on legal issues, and with the Leader of the Opposition on the possibility of forming an alternative Ministry, the argument that it is improper for the Governor to consider advice from any source other than the Premier, becomes very shaky. Once the Governor takes the step of inquiring

[31] *Ibid.*, p. 269.
[32] *Ibid.*, p. 267

of the Leader of the Opposition whether he is in a position to form an alternative Ministry, it is difficult to appreciate at what point the giving of information ends and the tendering of advice begins. The Leader of the Opposition may have the numbers but he might prefer dissolution.

Once the proposition is accepted that the Governor has a discretion in the exercise of the power of dissolution and may reject the advice of the Premier to grant a dissolution, there cannot, in this writer's opinion, be any valid objection to the Governor's seeking guidance from persons outside the Government as to whether he should accept or reject the Premier's advice to dissolve. Whatever his final decision some Ministry must be prepared to take responsibility for it. The reasons advanced by a Premier who requests a dissolution may not fairly represent the true political situation or a fair appraisal of precedents and authoritative opinions. While the Chief Justice and the Crown law officers might be relied upon to present an impartial brief on the relevance of precedents and opinions, might not it be reasonable for the Governor to solicit the views of the Leader of the Opposition? If the Governor's discretion is to be exercised judiciously, it seems eminently desirable that both sides should be heard.

The Tasmanian precedents discussed in the preceding pages reinforce the view that the Queen and her representatives in the exercise of the power of dissolution have a discretion to accept or reject the advice tendered by the chief Minister. As far as the considerations which properly may affect the exercise of the discretionary power are concerned, the precedents add little to the existing stock of authorities, for the Governors have scrupulously avoided indicating what factors have weighed with them in reaching their decisions.

No complaint has been made that in any of the cases examined the Governor or Administrator acted unreasonably or inconsistently with constitutional conventions. Although in each instance a dissolution was granted at the request of the Premier there has been no hint that the grant has been automatic or that the Governor has declined to consider advice tendered by persons other than the Premier. It does seem, however, that provided supply has been granted and that a Ministry has demonstrated a sincere effort to carry on as a government for a reasonable period after general elections, Tasmanian Governors may be reluctant to refuse a request for dissolution and in particular, will be more prepared to grant a dissolution than to commission an alternative Ministry.

CURRENT SURVEY

PAGE

United Kingdom 180
Commonwealth and Dependent Territories 203

This digest, which has been compiled by Gordon Borrie, Barrister-at-Law, covers the period January 1, 1961, to March 31, 1961.

UNITED KINGDOM

Courts

Criminal Courts

Report. The report of the Interdepartmental Committee on the Business of the Criminal Courts (Chairman: Mr. Justice Streatfeild) has been published (Cmnd. 1289).

Legal Aid and Advice

Report. The tenth annual report of the Law Society has been published with the comments and recommendations of the Lord Chancellor's Advisory Committee, 1959–60 (H.M.S.O. 39–72–10).

Scotland. The Legal Aid (Scotland) (Remuneration) Regulations, 1960, have been made.

The fees paid to counsel and solicitors giving legal aid in court proceedings are at present limited, in certain proceedings, to 85 per cent. of the amount allowed on taxation of accounts. These regulations increase the payment, in those cases, to 90 per cent. of the fees allowed on taxation (S.I. 1960 No. 2447).

Account has been published of the receipts and expenses of the Law Society of Scotland paid into and out of the Legal Aid (Scotland) Fund, 1959–60, together with the report of the Comptroller and Auditor-General thereon (H.C. 81 of 1960–61).

Legal Proceedings against Justices

The report has been published of the Working Party on the Expenses of Legal Proceedings against Justices and Clerks (Chairman: W. T. C. Skyrme, C.B.E., T.D.) (H.M.S.O. 34–404).

Education

Central Advisory Council

On March 9, 1961, in a written answer, the Minister of Education announced the names of the reconstituted Central Advisory Council for Education in England under the chairmanship of Lord Amory (636 H.C. Deb. 55–57).

Education for Management

On February 3, 1961, in a written answer, the Minister of Education announced the composition of the United Kingdom Advisory Council on Education for Management under the chairmanship of Mr. J. W. Platt (633 H.C. Deb. 164–165).

Higher Education

On February 9, 1961, in a written answer, the Prime Minister announced the membership of the Committee of Inquiry into Higher Education under the chairmanship of Lord Robbins (634 H.C. Deb. 104; see also 634 H.C. Deb. 1761–1763).

Technical Education

White Papers have been published on Technical Education in Scotland—"Pattern for the Future" (Cmnd. 1245) and "Better Opportunities in Technical Education" (Cmnd. 1254).

The Report of the Central Advisory Council for Education (Wales) on Technical Education in Wales (Chairman: A. B. Oldfield Davies, C.B.E.) has been published (H.M.S.O. 27–345).

Universities

Building programme. On January 25, 1961, the Chancellor of the Exchequer, in a written answer, announced that he had authorised the University Grants Committee to increase the Government-financed university building programme of new projects in the years 1962 and 1963 from £15 million each year to £25 million each year. For the years 1964 and 1965 he had authorised the committee to invite the universities to make building plans on the basis of new projects costing up to £30 million in each year (633 H.C. Deb. 31–32).

Grants. On February 9, 1961, the Minister of Education, in a written answer, published details of the revised scale of parental contributions in respect of grants to students which will come into force in October, 1961 (634 H.C. Deb. 88–90).

Government Functions and Appointments

Agriculture

Annual Review. The Annual Review and Determination of Guarantees, 1961, has been published (Cmnd. 1311).

Debate. On March 29, 1961, the House of Lords debated agriculture (230 H.L. Deb. 119–141 and 146–220).

Scotland. The Report on Agriculture in Scotland for 1960 has been published (Cmnd. 1315).

Aliens

The Aliens Order, 1960, amends the Aliens Order, 1953 ("the principal order"), with effect from January 1, 1961, and relates to the liability of aliens to register with the police and certain other matters. Under article 3 of the present order no alien will be required to register or furnish particulars, or changes in particulars, to the police under the principal order, unless he is required, by a landing condition or under the First Schedule to the principal order, to leave the United Kingdom within a specified period. Article 5 of the present order makes consequential provision regarding the duties of registration officers. Under article 4 the requirement to keep a central register of aliens is abolished. Under article 15 (2) of the principal order the normal postponement for three months of the obligation of an alien to register is made subject to certain exceptions: under article 6 of the present order there is added to the exception the case of an alien who is required by notice of the Secretary of State to register forthwith. Under articles 16 and 17 of the principal order registered aliens are required to notify within 72 hours changes of residence or address or of particulars entered in the registration certificate: under article 7 of the present order this period is extended to

seven days. Article 18 of the principal order makes provision regarding the production by aliens of documents establishing their identity: the new article 18 set out in article 8 of the present order makes fresh provision in this respect; in particular, the requirement to produce is now restricted to aliens over the age of sixteen, and the provision as to detention of aliens who fail to comply with the article is not reproduced. Under article 24 of the principal order aliens serving in the United Kingdom in the armed forces of certain countries are exempt from the provisions of the principal order: under article 9 of the present order, Greece and Turkey are added to the list of these countries. Under the First Schedule to the principal order aliens entering the United Kingdom through the Irish Republic are subject to certain restrictions which, however, are modified in the case of the nationals of certain countries: under article 10 of the present order, Bolivia, Mexico, Morocco and Spain are added to the list of these countries. Under article 11, aliens registering will no longer be required to give particulars of service under any government (S.I. 1960 No. 2214).

Inland Revenue Commissioners

Account of the National Land Fund, 1959–60, has been published, together with the report of the Comptroller and Auditor-General thereon (H.C. 126 of 1960–61).

Report of the Commissioners of Her Majesty's Inland Revenue, 1959–60, has been published (Cmnd. 1258).

Ministers' Functions

Defence. The Report on Defence, 1961, has been published (Cmnd. 1288).

Research

Agricultural Research Fund. The account of the receipts into and out of the Agricultural Research Fund, 1959–60, has been published together with the report of the Comptroller and Auditor-General thereon (H.C. 145 of 1960–61).

National Research Development Corporation. The report and statement of accounts of the corporation for 1959–60 has been published (H.C. 43 of 1960–61). Account has also been published of the sums received by the corporation in respect of interest and repayment of advances, and of disposal of those sums respectively, 1959–60, together with the report of the Comptroller and Auditor-General thereon (H.C. 68 of 1960–61).

Highways

Access

The appellants had a long frontage to a highway, and enjoyed access to the carriageway over the footway, which was not raised up. The respondent corporation was a highway authority; they proposed to raise and pave part of the footway in front of the appellants' premises. The appellants obtained an injunction before Lord Parker C.J. ([1960] P.L. 77), which was discharged by the Court of Appeal ([1960] P.L. 399). *Held,* dismissing the appeal, that the respondents had power to carry out the proposed works under section 67 (2) of the Highways Act, 1959, subject to paying compensation under section 67 (6): Ching Garage *v.* Chingford Corporation [1961] 1 W.L.R. 470; [1961] 1 All E.R. 671, H.L.

See also Local Government (below, p. 184).

Housing

Debate

On March 20, 1961, the House of Commons in Committee of Supply debated housing (637 H.C. Deb. 39–156).

Local Authority Housing

England and Wales. Important changes in housing subsidies to local authorities are announced in a Government White Paper "Housing in England and Wales." Although, in the fifteen years since the Second World War, more than three and a quarter million new houses and flats have been built, and, by the end of 1961, one family in four will be living in a post-war house, many accommodation problems still remain. The Government believes that the proposals outlined should "give fresh impetus to solving the housing and slum clearance problems of big towns and cities; should speed up building for old people; should start a drive against overcrowding and squalid conditions in houses in multi-occupation; should help local authorities that are in genuine difficulty over completing their housing tasks; should point the way to a new development in building to let, and should hasten the modernising of thousands of older houses." At present, housing subsidies are costing the Exchequer some £61 million a year, with an annual rate of increase of about £3 million. The new proposals are not expected to change this rate of subsidy but, in future, payment of subsidy will be better distributed and be used to greater advantage in meeting housing needs. Existing subsidies provide for the payment of fixed annual amounts for specified purposes, payable for sixty years at the same rate per dwelling to all housing authorities regardless of their financial resources. These basic amounts are £10 a year for one-bedroom dwellings for general needs; £22 1s. a year for slum clearance rehousing; and £24 a year for housing overspill population and (in special circumstances) for incoming industrial workers. There is a discretionary power to increase subsidy (apart from overspill and industrial housing) up to a maximum of £30 a year where a local authority can show that, unless given extra assistance, they will have to charge unreasonably high rents or incur an unduly heavy rate burden. The payment of the new subsidies will take more account of the financial resources of the individual housing authorities. At present there are two classes of housing authorities: those which could not balance their housing accounts even if they increased rents, and those which could balance their accounts with the aid of increased rents. Under the new arrangement a higher subsidy of £24 will be paid for every house built by an authority whose housing revenue account could not be balanced without rate contribution even if rents totalling twice the 1956 gross value of the houses were charged (*i.e.*, the estimated letting value in 1939 as shown in the 1956 valuation list). Other housing authorities will receive £8 for every house built. As at present, an additional subsidy will be paid for dwellings in tall blocks, and the present discretionary subsidy of £30 a house for authorities in great financial difficulties will be raised to £40. Housing authorities retain the power to fix rents, but the Minister, in deciding whether an authority is in need or not, will take into account whether it has a differential rent scheme in operation (taking into account the incomes and liabilities of tenants). In this way, states the White Paper, the Government will encourage councils "to pursue reasonable rent policies." Details are also given of a scheme whereby Exchequer loans up to a maximum of £25 million are to be available to approved housing associations in order to finance the building of houses to let at unsubsidised rents (Cmnd. 1290; Commonwealth Survey, C.O.I., February 28, 1961).

On March 3, 1961, the House of Commons passed a resolution welcoming the recognition given in the White Paper (Cmnd. 1290) to the urgent and increasing need for more housing and other accommodation for old people; and, while recognising the progress being made in providing it, called on the Government to see that this progress was maintained, and to take further steps to ensure that the accommodation provided for old people was really suited to their special needs (637 H.C. Deb. 39–156).

Scotland. A White Paper has been published on the Rents of Houses owned by Local Authorities in Scotland, 1960 (Cmnd. 1283).

Returns

The Housing Returns for Scotland (Cmnd. 1269) and for England and Wales (Cmnd. 1271), December 31, 1961, have been published.

Summary

A Summary has been published of the number of new houses built in Great Britain since the War up to January 31, 1961 (Cmnd. 1296).

Inquiries

Transport

Air. The report has been published of the Committee on Civil Aircraft Accident Investigation and Licence Control (Chairman: Mr. Justice Cairns) (C.A.P. 169).

Railway. The report has been published on the collision on June 3, 1960, at Waterloo (dated September 30, 1960).

Local Government

Finance

Rating and Valuation. The following decision has been reported on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955: *Re Headlands, Penarth, Trustees of National Children's Home and Orphanage (Registered)* v. *Penarth U.D.C.* (1960) 125 J.P.J. 75.

An art gallery was vested in Hull Corporation "upon trust to permit the same to be used and enjoyed by the citizens of the said city . . . and the public generally . . . for the exhibition of works of art in perpetuity." The public was admitted free to two-thirds of the building, which was under the care of a director, assistant director and staff. *Held* (by a majority), that the public had not such a right of unrestricted user of the building as would exclude any beneficial occupation of it by the corporation whose duty it was to maintain it, who could have charged the public for admission and who could let it at a rent even subject to the trust; the corporation was therefore liable to rates: Clayton *v.* Kingston-upon-Hull Corporation [1961] 2 W.L.R. 1; [1960] 3 All E.R. 840 (C.A.) (reversing the decision of the Lands Tribunal and distinguishing *Lambeth Overseers* v. *London County Council* [1897] A.C. 625).

A structure does not fall within section 9 (1) (*d*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, unless its purposes or adaptability are those of the structures mentioned in section 9 (1) (*a*) (*b*) or (*c*). *Quaere,* whether a whole house is a "structure" within the meaning of section 9 (1). A voluntary association claimed exemption from rates under section 9 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, for a home it kept for old and infirm blind people. *Held,* that it was not entitled to the exemption. The home did not fall within section 9 (1) (*b*) as belonging to a voluntary organisation for the prevention of, and care of persons suffering from, illness within section 28 (1) of the National Health Service Act, 1946, because blindness was not an illness. It did not fall within section 9 (1) (*b*) or (*c*) because the inmates were not there "in pursuance of arrangements made" with the local authority under section 28 or 29 respectively of the Act of 1946. And it did not fall within section 9 (1) (*d*) because it was not adapted for use in the above ways: Jewish Blind Society Trustees *v.* Henning [1961] 1 W. L. R. 24; [1961] 1 All E.R. 47 (C.A.) (reversing decision of the Lands Tribunal; considering *Mills & Rockleys* v. *Leicester City Council* [1946] K.B. 315).

For an agricultural building to be exempt from rates under section 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, it must be occupied by the same person or persons as a single piece of agricultural land and must

be used solely in connection with agricultural operations carried out on that piece of land alone. A grain dryer run by a committee of farmers was used to dry the grain from their farms and those of other members of a co-operative syndicate. *Held*, that it was not within section 2 (2) because it was not in the same occupation as any of the farms and was not used solely in connection with any of them: FARMERS' MACHINERY SYNDICATE (11TH HAMPSHIRE) *v.* SHAW [1961] 1 W.L.R. 393; [1961] 1 All E.R. 285, C.A. (reversing decision of the Lands Tribunal).

Two properties in the same ownership separated by a private road cannot be treated as contiguous, so as to be rateable as a single hereditament, unless the road is a hereditament contiguous to both properties. The appellant company owned two blocks of buildings some distance apart, but linked by a private road, controlled by the company, which passed beside both blocks. The Local Valuation Court and the Lands Tribunal each held that the two blocks were rateable separately. *Held*, dismissing the company's appeal, that the section of the road between the blocks could not be cut off from the rest of the road so as to form a separate rateable hereditament contiguous to both blocks, and therefore could not be an adequate link for making the blocks contiguous: BUTTERLEY CO. *v.* TASKER [1961] 1 W.L.R. 300 (C.A.) (affirming the decision of the Lands Tribunal).

In CANE *v.* ROYAL COLLEGE OF MUSIC (February 14, 1960) the Court of Appeal (Pearce, Harman and Davies L.JJ.) *held*, allowing an appeal from the Lands Tribunal, that the Royal College of Music, being a society instituted for purposes of the fine arts exclusively within section 1 of the Scientific Societies Act, 1843, was supported in part by annual voluntary contributions, and that it was entitled to exemption and was not a hereditament within the Rating and Valuation Acts. See also *The Times*, February 15, 1961.

By an informal agreement between the Gas Council and an area gas board the board carried on a research station on behalf of the Council. The board owned the land, employed the persons who worked there, paid the debts incurred by the station and insured the buildings; but, though the Council was not in exclusive possession of the station, it reimbursed the board its expenses and took assignments of the patents taken out, and in various ways the board purported to operate the station on the Council's behalf and in its name. *Held*, on the facts, that the board was in rateable occupation of the station by its servants: SOLIHULL CORPORATION *v.* GAS COUNCIL [1961] 1 All E.R. 542 (C.A.) (reversing the decision of the Lands Tribunal).

In assessing the rateable value of an amenity undertaking run by a local authority at a loss the Lands Tribunal is not bound to adhere strictly to the profits basis of valuation but can use it in modified form or reject it and reach a value between those proposed by the parties, so long as there is evidence before it on which it can properly ascertain an independent letting value. A corporation appealed against a valuation of a beach belonging to it which it ran at a loss, contending for a nil valuation, whereas the valuation officer contended for a valuation on the strict profits basis of £1,285. The Lands Tribunal departed somewhat from that basis and assessed the rateable value at £1,000. On appeal, *held* that the Lands Tribunal's decision should not be disturbed: MORECAMBE AND HEYSHAM CORPORATION *v.* ROBINSON [1961] 1 W.L.R. 373; [1961] 1 All E.R. 721, C.A. (affirming decision of the Lands Tribunal). *Semble*, in construing a valuation list the court applies the normal principle of construction, that evidence as to the intention of the maker of a document is not admissible, but that evidence may be given of the circumstances known to him.

A company owned premises used for accommodating caravans. The premises comprised (1) a small quarry site at the junction of B. Road and H. S. Road, and (2) a much larger and more valuable adjoining site on higher ground, joined by steps to the quarry site. In 1957 the valuation officer's

representative visited the premises, but did not discover the main site, and an entry was made in the valuation list as follows: "Land used as caravan park. Junction of B. Road and H. S. Road. £20." In 1958 the main site was discovered and it was proposed to alter the list by including the main site at a value of £2,600. The company gave notice of objection on the ground that the 1957 entry dealt with the whole of its premises, and the Lands Tribunal allowed its appeal from the local valuation court. On appeal by the valuation officer, *held* that, construed in the light of the surrounding circumstances, the 1957 entry related only to the quarry site: SUSSEX CARAVAN PARKS *v.* RICHARDSON [1961] 1 W.L.R. 561; [1961] 1 All E.R. 731, C.A. (reversing decision of the Lands Tribunal).

The valuation of public utility undertakings on a profits basis has received so strong a sanction by use that very strong reasons must exist in order to justify any departure from it. The British Transport Commission owned docks in two boroughs at Grimsby which were operated at a loss. The valuation officer put forward £6,177 and £70 as a reasonable rent at which the docks in the respective boroughs might hypothetically be let, and argued that the profits basis (which would produce a nil valuation) should not be adopted because of the special circumstances, which were: (a) the docks were arbitrarily divided from the Commission's railways; (b) the Commission's accounts were largely an inter-departmental matter; (c) the Commission's railways benefited from the dock traffic; and (d) any loss in running the docks was made up from other resources of the Commission. *Held,* that none of the circumstances warranted a departure from the profits basis, which was prima facie the correct method of assessing docks: BRITISH TRANSPORT COMMISSION *v.* HINGLEY [1961] 2 W.L.R. 370 (C.A.) (affirming decision of the Lands Tribunal).

Liability to repair

Land drainage. A drain in a rural district the main purpose of which is land drainage rather than road drainage, and the maintenance of which was by an enclosure award laid on the surveyor of the highways of the parish, is by section 30 (1) of the Local Government Act, 1929, repairable by the rural district council, not by the county council, the highway authority. Whether the drain is a land drain or a road drain is a question of fact and of degree.

By an award made under a local enclosure act a certain drain was to be maintained by the surveyor of the highways of the parish, whose duties were later vested in the highways board and later still in the rural district council. By section 30 (1) of the Local Government Act, 1929, the county council was made highway authority in place of the rural district council but there were reserved to the latter council "any functions not being functions with respect to highways." Salmon J. found as a fact that the drain was to be regarded as a land drain and held that it was repairable by the rural district council. On appeal *held,* that on the facts as found the decision was correct: ATT.-GEN. *v.* ST. IVES RURAL DISTRICT COUNCIL [1961] 2 W.L.R. 111; [1961] 1 All E.R. 265, C.A.

Police

Judges' Rules. On March 16, 1961, the Home Secretary, in a written answer, said that he had consulted with both the Lord Chief Justice and the chairman of the Royal Commission on the Police, and the Lord Chief Justice has agreed that the judges should carry out a review of the scope and operation of the Judges' Rules. The chairman of the Royal Commission on the Police has agreed to make available, for the purpose of this review, any relevant material that comes, or has come, to the Commission's notice (636 H.C. Deb. 145; see also 637 H.C. Deb. 1512–1514).

See also HOUSING (above, p. 182); NATIONAL INSURANCE (below, p. 190); and TOWN AND COUNTRY PLANNING (below, p. 200).

Monopolies and Restrictive Practices

Monopolies Commission

The annual report for the year ending December 31, 1960, has been published by the Board of Trade on the operation of the Monopolies and Restrictive Practices Acts, 1948 and 1953. One report of the Monopolies Commission was published in 1960, on the supply of chemical fertilisers. Work on a report on the supply of cigarettes and tobacco and of cigarette and tobacco machinery continued, and in addition, the Commission had before them the following references: (a) the supply of electrical equipment for mechanically propelled land vehicles, and (b) the Solus sites system of retail sale of petrol in the United Kingdom (H.C. 122 of 1960–61).

Restrictive Practices Court

Decision. An agreement between the United Kingdom manufacturers of motor-cars and light commercial vehicles contained provisions requiring the signatories to prescribe minimum prices at which their products could be sold retail, regulated the rates of discount to be given to dealers and contained restrictions as to the sale of vehicles to fleet users. The Restrictive Practices Court *held* that the agreement was contrary to the public interest and further ordered the respondent to pay 3,000 guineas towards the costs of the Registrar for suppressing certain documents and being guilty of unreasonable conduct within the Restrictive Practices Court Rules, 1957, r. 56: *Re* Motor Vehicles Distribution Scheme Agreement [1961] 1 W.L.R. 92; [1961] 1 All E.R. 161, R.P.Ct.

Restrictive Trading Agreements

A report has been published on the work of the Registrar of Restrictive Trading Agreements for the period August 7, 1956, to December 31, 1959. The position at the end of 1959 was that the parties to 490 agreements had been advised of the Registrar's intention to start proceedings. 320 of these agreements had been abandoned before the issue of a Notice of Reference. Notices of Reference had been issued in 93 cases, and 43 of these had come before the court, only nine of them having been defended. There remained some 120 cases at all stages of preparation between the initial approach and a court hearing (Cmnd. 1273).

National Health Service

Accounts

Summarised Accounts of Regional Hospital Boards, Boards of Governors, Hospital Management Committees, Executive Councils and the Dental Estimates Board for England and Wales for 1959–60, have been published, together with the report of the Comptroller and Auditor-General thereon (H.C. 124 of 1960–61).

Similar accounts for the Scottish authorities have also been published (H.C. 125 of 1960–61).

Costs and charges

The Minister of Health made a statement in the House of Commons on February 1, 1961, about the rising cost of the National Health Service and the measures proposed by the Government to meet this cost. The Minister said that the net estimate expenditure by the National Health Service and the Health Departments in 1961–62 would be 11 per cent. above that in 1960–61, following increases of 8 per cent. in 1960–61 and 6 per cent. in 1959–60. The total cost in 1960–61 was about £867 million, of which £663 million would be met by the Exchequer. The Government was determined to continue its policy of developing the service and, in particular, of carrying through its

long-term hospital modernisation programme, but these objects would be in danger if the cost of the service to the Exchequer were allowed to go on increasing at so high a rate. It was, therefore, proposed to adjust the charges made for various items, the cost of which had substantially increased since the amounts were last fixed. The charges for dentures would be increased by amounts ranging from 5s. to 15s.; on the other hand, to put more emphasis on conservation, the charges for dental treatment would not be raised, and children and expectant and nursing mothers would be relieved of the present charges for dentures. The charges for spectacles generally would be increased by 5s. a pair, with a higher charge for bifocal and multifocal lenses, but children, who can at present have free lenses if in frames from the children's range, will in future be able, if aged ten or over, to choose frames from the adult range and still have their glasses free. The maximum charges for amenity beds in England and Wales would be doubled from 12s. and 6s. to 24s. and 12s. a day. The prescription charge would be raised from 1s. an item to 2s. It had also been decided to charge a price covering the cost for orange juice, cod-liver oil and vitamin tablets at present provided free or at less than cost price under the Welfare Foods Scheme for expectant and nursing mothers and young children. The existing arrangements for refund of prescription and other charges on grounds of financial hardship would remain in force, and arrangements would be made for the free issue of vitamin supplements to people who could not afford the new prices.

The Government also proposed to increase the National Health Service contribution (paid with their National Insurance contribution by all citizens except the minority who are exempt from paying National Insurance) by 1s. a week for an employed man (10d. to be paid by the employee and 2d. by the employer) and by appropriate amounts for other insurance groups. The increased dental and optical charges require legislation, and a Bill to effect them was introduced on February 2. The increase of contributions also requires legislation. Statutory instruments authorising the changed charges for prescriptions, amenity beds, and welfare foods are to be made as soon as possible. It is intended that the increased amenity bed charge and increased prescription charge should operate from March 1, the new welfare food charges from June 1, and the increased National Health Service contribution from the beginning of July. All the changes apply both to England and Wales and to Scotland, except that is, the charges for amenity beds, which in Scotland are adjusted automatically. The Minister said that the effect of all the measures he had announced would be to reduce the net estimated expenditure by about £50 million in 1961–62 and about £65 million in a full year.

The Government's proposals to increase the weekly National Health Service contribution and to introduce new charges and raise existing ones were debated in the House of Commons on February 8 on an Opposition motion deploring the Minister of Health's statement which, the motion stated, clearly indicated "the determination of Her Majesty's Government to undermine the National Health Service and to place heavy burdens on those least able to bear them." The chief Opposition speaker was Mr. George Brown, Deputy Leader of the Parliamentary Labour Party, and the chief Government speaker was Mr. Enoch Powell, the Minister of Health. Opening the debate, Mr. George Brown referred to the unfavourable reception of the Government's proposals by most newspapers and to the large volume of critical letters he and his colleagues had received from doctors, pharmacists and patients. Mr. Brown said it was claimed that the cost of the Service was higher than the nation could afford, and prevented desirable developments such as new hospitals, and that there was waste in the Service which the charges would help to avoid. He thought that the figure to be looked at was not the total sum but the proportion of national income, which was almost exactly the same as in 1950. He welcomed the new hospital programme, but he understood that it provided an increase of £5 million a year up till 1965–66; the

amount the Minister expected to save by his new proposals was £65 million a year. He questioned whether there was waste in prescribing; of course there were expensive new drugs—but they were saving lives and getting people back on their feet and back to work very much more quickly. Where he saw waste was in drug sales promotion and sales pressure. He asked for a full inquiry into the cost of drugs and the state of the pharmaceutical industry.

Replying to Mr. Brown the Minister of Health dwelt on the improvements being made in the National Health Service. There was a steady, in some respects dramatic, increase in the numbers of staff in the Hospital Service. The capital outlay on hospitals was rising yearly and the measures announced in January would facilitate long-term planning and so achieve a genuine economy. Considerable capital development was taking place in local authority services. These developments were necessarily reflected in the gross cost of the Service.

The Minister said that the increases in charges were tiny and negligible in comparison with the increase in all kinds of benefits and earnings since those charges were last fixed. He stressed that there were arrangements for the charges to be met or refunded where there was a possibility they might cause genuine hardship. All charges were recoverable in respect of recognised war disabilities. All who were in regular receipt of payments from the National Assistance Board could obtain across the counter at any post office a refund of any of the charges, and the National Assistance Board would refund also to people who would be involved in some degree of hardship even though above its normal standards of need, including people who were in employment.

At the end of the debate the Opposition motion was defeated by 321 votes to 231.

(633 H.C. Deb. 987–994; 634 H.C. Deb. 406–590. Commonwealth Survey, C.O.I., February 14, 1961.)

The House of Commons had further debates on the National Health Service on February 9 (second reading of the National Health Service Bill) (634 H.C. Deb. 653–780), on February 15 (second reading of the National Health Service Contributions Bill) (634 H.C. Deb. 1412–1690), on February 16 (motion to annul the National Health Service (Charges for Drugs and Appliances) Regulations, 1961) (634 H.C. Deb. 1841–1914), on March 6 (motion to annul the National Health Service (Hospital Charges for Drugs and Appliances) (Scotland) Regulations, 1961) (636 H.C. Deb. 195–216), on February 23, March 9, and March 13 (Committee stage of the National Health Service Contributions Bill) (635 H.C. Deb. 805–1052, 636 H.C. Deb. 696–842, 636 H.C. Deb. 983–1146) and on March 16 (third reading of the National Health Service Contributions Bill) (636 H.C. Deb. 1774–1896).

The House of Lords debated the Government's proposals on February 13 (228 H.L. Deb. 605–700), and on March 9 (229 H.L. Deb. 561–602).

Regional Hospital Boards

The National Health Service (Functions of Regional Hospital Boards, etc.) Regulations, 1961, increase from £30,000 to £60,000 the limit of the estimated cost of any building and civil engineering work which regional hospital boards and boards of governors of teaching hospitals may undertake without the consent of the Minister of Health (S.I. 1961 No. 34).

Scotland

Regional Hospital Boards. The National Health Service (Functions of Regional Hospital Boards) (Scotland) Amendment Regulations, 1961, raise from £30,000 to £60,000 the limit on a building or civil engineering project or scheme that a regional hospital board may undertake without the consent of the Secretary of State (S.I. 1961 No. 125).

Scottish Health Services Council. The report by the Standing Advisory Committee on Local Authority Services (Chairman: Councillor Mrs. T. M. Allen, J.P., M.A., LL.B., D.P.A.) has been published (H.M.S.O. 49–472).

The National Health Service (Constitution of Standing Advisory Committees) (Scotland) Amendment Order, 1960, increases from two to eight the maximum number of members to be appointed by the Secretary of State to the Standing Medical Advisory Committee; and abolishes the Standing Advisory Committees on Hospital and Specialist Services, General Practitioner Services and Health Centres (S.I. 1960 No. 2438).

The National Health Service (Scottish Health Services Council and Standing Advisory Committees) Amendment Regulations, 1960, provide for the alteration from three years to four years of the term of office of members of the Scottish Health Services Council and of any Standing Advisory Committee constituted under the National Health Service (Scotland) Act, 1947 (S.I. 1960 No. 2439).

National Insurance

Benefits

The National Insurance (Increase of Benefit and Miscellaneous Provisions) Regulations, 1960, which are made in consequence of the National Insurance Act, 1960, increase the rates of benefit payable under certain regulations made under the National Insurance Act, 1946, in order to bring them into conformity with the higher rates of benefit payable directly under that Act by virtue of the Act of 1960. Provision is made in relation to the payment of additional benefit in the case of persons not residing in Great Britain. The remaining provisions are of a minor or consequential character (S.I. 1960 No. 2422).

Classification

The National Insurance (Classification) Amendment Regulations, 1961, amend the National Insurance (Classification) Regulations, 1948.

The regulations provide that the National Dock Labour Board shall be treated for the purposes of the National Insurance Act, 1946, as the employer of persons employed as daily workers under the Dock Workers (Regulation of Employment) Scheme, 1947 (S.I. 1961 No. 420).

The report of the National Insurance Advisory Committee on the preliminary draft of these regulations has also been published (H.C. 139 of 1960–61).

Decisions of the Commissioner

Absence from though resident in Great Britain. In connection with a claim for unemployment benefit made on arrival in Great Britain it was contended for the claimant that as, under the provisions of the Family Allowances and National Insurance (Australia) Order, 1958, he was to be "treated . . . as if he had been resident" in Great Britain during the period of the voyage from Australia, it could not be held that he was "absent from Great Britain" during that period. *Held* that the claimant was "absent from Great Britain" during the voyage. The order provides that a person claiming unemployment benefit in one country shall be treated as if he had been resident there during any period while proceeding from the other country if that period does not exceed 13 weeks. Subject to this, the claim must be decided under the provisions of the National Insurance Act in exactly the same way as that of a claimant who in fact resides in this country. As the claimant was absent from Great Britain during the relevant period he was disqualified for receiving benefit during that period by section 29 (1) (*a*) of the National Insurance Act, 1946: Decision No. R(U) 18/60.

Cessation or interruption of contributions to child's maintenance—whether involuntary and temporary: Decision No. R(G) 3/60.

Good cause for breach of rule of behaviour. A claimant certified to have been incapacitated by a blood disease from before July 5, 1948, and receiving sickness benefit, drove a tractor to take feeding stuff to sheep on mountain pasture. He was apparently in the habit of doing this several times a week and said that an examining medical officer had told him he could do a few light jobs on the farm. The examining medical officer confirmed that he possibly did tell the claimant this. *Held* that the claimant had shown good cause for breaking the rule forbidding work by doing work which the medical officer had recommended for the purpose of taking his mind off his condition: Decision No. R(S) 10/60.

Local Tribunals—recording of decisions. A local tribunal did not record any findings of fact or grounds of their decision. The Commissioner draws attention to the obligation which is placed on local tribunals by regulation 14 (1) of the National Insurance (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948 No. 1144): it is most important that a tribunal's notes of evidence should be complete and that the findings of fact should be clearly stated and indicate on what evidence they are based: Decision No. R(U) 16/60.

Married woman's responsibilities. A married woman with a young baby refused to apply for employment which began at 7.15 a.m. each day. She had been unemployed for nine months and was available for full-time employment locally from 9 a.m. *Held,* (i) by reference to regulation 10 of the National Insurance (Married Women) Regulations, 1948, she had good cause for refusing. It was not reasonable to expect her to have her baby ready to be left in someone else's care in time for her to start work at 7.15 a.m.

(ii) as a consequence of her restricted availability she had no reasonable prospects of securing employment; nor were the restrictions reasonable within the meaning of regulation 6 (1) (*aa*) of the National Insurance (Unemployment and Sickness Benefit) Regulations, 1948. Benefit not payable: Decision No. R(U) 20/60.

Normal course of working—exceptional industrial circumstances during year preceding claim: Decision No. R(U) 21/60.

Prescribed manner of claiming—claims to be made to the Minister: Decision No. R(S) 9/60.

Residing together—wife in mental hospital. A hospital in-patient suffering from pulmonary tuberculosis claimed an increase of sickness benefit in respect of his wife who had been in a mental hospital for twenty-three years and had no prospect of being discharged. Having contributed nothing to the maintenance of his wife he could not succeed in his claim unless he could show that she was residing with him. In the early years he was obliged to contribute to her maintenance and did so but for many years he had not been obliged to and did not contribute. For fifteen years he kept the home together but became despondent, sold up the home and lived in lodgings. He had not visited his wife for some years because of his tuberculosis. *Held* that there was no evidence, other than the mere absence in hospital, that claimant and his wife had ceased to reside together. Accordingly, applying Regulation 4A of the General Benefit Regulations, they were residing together at the material time. An increase of benefit was not payable, however, when his wife had been receiving free in-patient treatment for over 104 weeks, because such payment was precluded by regulations as he was not incurring expediture in respect of her and not regularly making payments to her or for her benefit: Decision No. R(S) 8/60.

Seasonal workers. A fisherman was a seasonal worker. In the two years immediately preceding a claim for benefit made during his off-season he had not been registered for employment for a continuous period of about six weeks while attending classes and studying for his mate's certificate. *Held,*

that this period of six weeks was a temporary period throughout which he was not available for employment by reason of circumstances of "an exceptional character." He therefore satisfied the additional condition as to registration of a seasonal worker for employment: Decision No. R(U) 19/60.

Share fisherman—repairs or maintenance which it is the duty of the share fisherman to undertake: Decision No. R(U) 10/60.

Short-time working. A hosiery trimmer who worked on day and night shifts in alternate weeks claimed benefit for a Saturday in a week of day shift. The standard working week in his industry was one of forty-five hours but at his place of employment it was modified to forty-seven-and-a-half hours on day shift and forty-two-and-a-half hours on night shift. In the year preceding his claim the claimant had not worked on any Saturday out of twenty-four day-shift weeks, in eighteen of which he worked less than forty-seven-and-a-half hours because of adverse industrial conditions. In the previous year he had worked on six Saturdays out of twenty-six weeks on day shift, in thirteen of which he worked less than forty-seven-and-a-half hours. *Held*, that the day of claim was a day on which in the normal course the claimant would not work. Since the preceding year contained weeks of short-time working due to adverse industrial conditions the claim was excluded from the operation of section 4 (1) of the National Insurance Act, 1957. It was therefore necessary, under regulation 6 (6) of the National Insurance (Unemployment and Sickness Benefit) Regulations, to determine the normal course of working by examining the claimant's record of working in weeks which were not weeks of short-time working due to adverse industrial conditions. The claimant had worked on a minority of Saturdays in nineteen such weeks in the two years before his claim.

Held also that: (i) the expression "short-time working due to adverse industrial conditions" relates, not to the claimant's personal experience, but to short-time working in the factory or industry in which he works; (ii) "short-time working" means an extent of working which is less, by at least an hour, than the full time of the claimant's standard working week; (iii) the standard working week may be that which has been generally agreed between an employer and a trade union; or a local modification of such a week; or, in the absence of such an agreement, the week which is recognised as the standard working week under a person's contract of service: Decision No. R(U) 17/60.

Mariners

The National Insurance (Mariners) Amendment Regulations, 1960, amend the National Insurance (Mariners) Regulations, 1948, by making provisions relating to any period of leave on pay at the end of a mariner's voyage. The mariner and his employer are to pay contributions as if the mariner's employment had continued throughout any such period; and, if the mariner becomes employed again during the period, both he and his employer in the new employment are to have the right to pay contributions in respect of the new employment during the period of leave on pay, and any mariner's contributions so paid may be re-allocated or repaid. These provisions do not apply where the voyage is in a ship or vessel used wholly or mainly for the disposal of sludge.

The regulations also add provisions which modify and supplement, in regard to a seaman, provisions in sections 1 and 2 of the National Insurance Act, 1959, determining liability for graduated contributions. They prescribe the manner in which contributions payable are to be calculated and specify the payments which are not to be taken into account in deciding, for graduated contribution purposes, the amount of a seaman's remuneration (S.I 1960 No. 2431).

The report of the National Insurance Advisory Committee on the preliminary draft of these Regulations has also been published (H.C. 21 of 1960–61).

Married Women

The National Insurance (Married Women) Amendment Regulations, 1960, have been made.

By these regulations, married women will be treated in the same way as other persons for graduated contribution purposes (S.I. 1960 No. 2429).

Non-Participation

For new sets of regulations, see S.I. 1961 Nos. 21, 137, 138, 194, 206, 267, 306, 307, 323, 324, 391, 405, 513, 525.

The report of the National Insurance Advisory Committee on the preliminary draft of the National Insurance (Non-Participation—Benefits and Schemes) Amendment Regulations, 1961, (S.I. 1961 No. 137) has also been published (H.C. 44 of 1960–61). The report of the National Insurance Advisory Committee on the preliminary draft of the National Insurance (Non-Participation—Continuity of Employment) Regulations, 1961, (S.I. 1961 No. 138) have also been published (H.C. 45 of 1960–61).

The Ministry of Housing and Local Government has issued circulars explaining the modification of local government superannuation schemes involved in the National Insurance (Modification of Local Government Superannuation Schemes) Regulations, 1961 (S.I. 1961 No. 21), and the National Insurance (Modification of Local Government Superannuation Schemes) No. 2 Regulations, 1961 (S.I. 1961 No. 405) (Circulars Nos. 2/61 and 9/61).

The Scottish Home Department has issued a circular explaining the modification of local government schemes involved in the National Insurance (Modification of Local Government Superannuation Schemes) (Scotland) Regulations, 1961 (S.I. 1961 No. 206) (Circular No. 9765).

National Insurance (Industrial Injuries)

Benefits

The National Insurance (Industrial Injuries) (Increase of Benefits and Miscellaneous Provisions) Regulations, 1960, which are made in consequence of the passing of the National Insurance Act, 1960, increase the rates of certain benefits payable under regulations made under the National Insurance (Industrial Injuries) Act, 1946, in order to bring them into conformity with the higher rates of benefit payable directly under that Act by virtue of the Act of 1960 and contain supplementary and transitional provisions following upon the passing of the last mentioned Act (S.I. 1960 No. 2430).

Decisions of the Commissioner

Coronary disease—sudden death not due to effort at work: Decision No. R(I) 44/60.

Dermatomycosis of feet (*Epidermophytosis*) *not due to wearing rubber boots*: Decision No. R(I) 43/60.

Essential Hypertension—not due to worry: Decision No. R(I) 45/60.

"*Family fund.*" Widow claimed industrial death benefit in respect of her son. Family had been claimant, a fourteen-year-old daughter and the deceased son. Effective family fund comprised £5 3s. 0d. by deceased and claimant's widowed mother's allowance of £3 10s. 0d. *Held* that amendments in 1956 and 1957 to paragraph 5 of Part I of Second Schedule to National Insurance Act, 1946, justified view that only basic allowance was for maintenance of widow and increase was intended for maintenance of child. Claimant's personal contribution to family fund thus reduced to £2 10s. 0d. and as difference

from unit cost of maintenance (£2 17s. 8d.) was more than 5s. 0d. claimant was being maintained to a substantial extent and was entitled to a gratuity. The "family fund" principle should be adopted in determining the issue of maintenance unless it can be shown that it would produce a result which is plainly at variance with the evidence as to the family circumstances. Decisions C.I. 177/49 (not reported) and R(I) 75/52 no longer to be followed: Decision No. R(I) 20/60.

Osteomyelitis—not the result of bruises sustained in an accident: Decision No. R(I) 2/61.

"*Out of and in the course of employment.*" Admiralty policeman on traffic control duty at dockyard gate was injured when he left his post to stop an unattended pushchair with a child in it which was running down a gradient on the road outside the dockyard. The road was used by the public but was Admiralty property. *Held* that the accident arose out of and in the course of the claimant's employment. His act was something reasonable and sensible for him to do and he was discharging, in the emergency, a duty imposed upon him as a police constable to help members of the public. The case fell within the general class of emergency cases not needing the support of section 10: Decision No. R(I) 46/60.

Special Hardship Allowance. A deputy at a coal mine, employed at the training face, was assessed at 10 per cent. for pneumoconiosis from November 21, 1955. He continued to work in his regular occupation but was to retire on superannuation in April 1960. A number of men had to be discharged on account of redundancy and the claimant was one of those selected, the others selected were all disabled men. For a time after his discharge on October 3, 1959, he registered for work as a deputy. The medical board had issued him with a "letter of advice" and so by virtue of regulation 37 of the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1959, he was deemed to be permanently incapable of following his regular occupation as the result of pneumoconiosis unless the contrary was proved. His doctor thought him incapable of his regular occupation because of breathlessness. *Held* that the claimant was not incapable of following his regular occupation. The degree of disablement from pneumoconiosis was only 10 per cent. and had remained stationary since 1955, and the medical board's decision on this must be accepted. The overall cardio respiratory disablement was also 10 per cent., so no additional cardio respiratory disablement had developed. The claimant was discharged because of redundancy and although his selection may have been because he had pneumoconiosis, this did not prove that he was incapable of his regular occupation because of the disease. Had there been a vacancy at the training face he could have taken it.

Claimant for Special Hardship Allowance, whose regular occupation was Colliery Repairer, abandoned that occupation as a result of an industrial accident and worked as a surface labourer. His earnings in both occupations were reduced due to his local government activities, but the Local Authority of which he was a member paid him such sums as brought his actual earnings up to what he would probably have earned had he not engaged in local government activities. *Held* that the claimant was not entitled to Special Hardship Allowance as he failed to establish that what he *would* probably have been earning in his regular occupation, having regard to his local government activities, was more than he *could* have earned in his employment as a surface labourer which was employment suitable in his case. The payments made to the claimant by the Local Government Authority could not be taken into account in calculating his standard of remuneration as a repairer or surface labourer because they were payments made in respect of his local government activities which were a subsidiary occupation. Commissioner considers position where a claimant, whose claim to Special Hardship Allowance has been rejected on account of his earnings in his regular occupation being reduced as a result of outside activities, abandons those activities

and subsequently renews his claim. R(I) 23/51 and R(I) 14/57 compared: Decision No. R(I) 9/61.

Tuberculosis—not prescribed re health visitor. As a health visitor employed by a local authority the claimant had to visit persons in their homes to give advice on the care of young children, sick persons, and expectant or nursing mothers. She also visited a welfare clinic where she might occasionally have to renew a bandage on a child suffering from a B.C.G. reaction. Special visitors were appointed to visit cases of tuberculosis but in the course of her general health visiting the claimant visited two families, in one of which a grandmother, and in the other the mother, had tuberculosis. She discussed the grandmother's family difficulties with her; and because of the poor mentality of the mother in the second family, she frequently visited her and gave her advice and instruction, *e.g.*, in bathing her children. *Held* that tuberculosis was not prescribed in relation to the claimant. She was not doing anything relevant to the treatment or nursing of the tuberculosis of the grandmother or of the mother, nor was she ministering to the needs of either: Decision No. R(I) 38/60.

Unemployability supplement. A lorry driver injured at work in 1947 claimed both damages at common law from a third party and workmen's compensation from his employers. He did not pursue his claim under the Workmen's Compensation Acts because under section 30 of the Workmen's Compensation Act, 1925, he was not entitled to recover both damages and compensation, but for a time his employer lent him sums of £2 10s. 0d. per week which were subsequently repaid when the common law claim was settled in 1950 for £10,000 and costs. It was common ground that the weekly payments of £2 10s. 0d. did not constitute payments of workmen's compensation. *Held* that the claimant had not at any time been entitled to weekly payments by way of compensation under the Workmen's Compensation Acts within the meaning of section 82 of the National Insurance (Industrial Injuries) Act, 1946, and regulation 32 of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948. "Entitled" as used in that section and regulation meant "entitled to receive payments," and the claimant had clearly never elected to recover compensation and had, in fact, eventually recovered damages: Decision No. R(I) 37/60.

Insurable and Excepted Employments

The National Insurance (Industrial Injuries) (Insurable and Excepted Employments) Amendment Regulations 1961, amend the National Insurance (Industrial Injuries) (Insurable and Excepted Employments) Regulations, 1948, by including among the insurable employments under the National Insurance (Industrial Injuries) Act, 1946, the employment of certain persons (usually known as accident site observers) in the inspection of the sites of accidents or dangerous occurrences in a mine or quarry pursuant to a consent given by an Inspector for the purposes of section 120 of the Mines and Quarries Act, 1954; and by prescribing the persons to be treated as the employers of such persons (S.I. 1961 No. 383).

Nationalised Industries

General

Debate. On February 20, 1961, the House of Commons, in Committee of Supply, debated the fuel and power industry (635 H.C. Deb. 36–160).

Airways

Account has been published of the sums received by the Minister of Transport and Civil Aviation from the Consolidated Fund and from B.E.A. and B.O.A.C. in respect of interest and repayment of advances and of the disposal

of these sums respectively, 1959–60, together with the report of the Comptroller and Auditor-General thereon (H.C. 147 of 1960–61).

Guarantees. Statements have been issued by the Treasury on loans proposed to be raised by B.E.A. (H.C. 46 of 1960–61) and B.O.A.C. (H.C. 47 of 1960–61).

Coal

Account has been published of the sums issued out of and received from the Consolidated Fund, and of the sums received from the National Coal Board in respect of Interest and Repayment of Advances and of the disposal of these sums respectively, 1959–60, together with the report of the Comptroller and Auditor-General thereon (H.C. 77 of 1960–61).

Electricity

Account has been published of the sums received by the Minister of Power from the Consolidated Fund and from the Electricity Council in respect of Interest and Repayment of Advances, and of the disposal of these sums respectively, 1959–60, together with the report of the Comptroller and Auditor-General thereon (H.C. 79 of 1960–61).

Account has also been published of the sums received by the Secretary of State for Scotland from the Consolidated Fund and from the North of Scotland Hydro-Electric Board and the South of Scotland Electricity Board in respect of Interest and Repayment of Advances and of the disposal of these sums respectively 1959–60, together with the report of the Comptroller and Auditor-General thereon (H.C. 37 of 1960–61).

Central Electricity Board. The Electricity (Amendment) Act, 1961 (9 & 10 Eliz. 2, c. 8), received the Royal Assent on March 2, 1961. This Act enables the Central Electricity Board to produce radio-active isotopes in their reactors for purposes of sale and to sell them (s. 1); section 2 short title, etc.

The Electricity Acts, 1947 and 1957 (10 & 11 Geo. 6, c. 54; 5 & 6 Eliz. 2, c. 48) and this Act may be cited together as the Electricity Acts, 1947 to 1961.

The Act, which does not extend to Scotland or to Northern Ireland, came into force on March 2, 1961.

Debates. On March 16, 1961, the House of Lords debated electricity generation in Scotland (229 H.L. Deb. 991–1066), and on March 21, 1961, the House of Lords debated the problems of the electrical industry generally (229 H.L. Deb. 1118–1148).

Guarantees. Statements have been issued by the Treasury on loans proposed to be raised by the Electricity Council (H.C. 56 of 1960–61), the North of Scotland Hydro-Electric Board (H.C. 58 of 1960–61), and the South of Scotland Electricity Board (H.C. 59 of 1960–61).

Reports and accounts have been published of the North of Scotland Hydro-Electric Board, 1960 (H.C. 110 of 1960–61), and the South of Scotland Electricity Board, 1960 (H.C. 130 of 1960–61).

Gas

Account has been published of the sums received by the Minister of Power from the Consolidated Fund and from the Gas Council in respect of Interest and Repayment Advances, and of the disposal of these sums respectively, 1959–60, together with the report of the Comptroller and Auditor-General thereon (H.C. 79 of 1960–61).

Guarantee. A statement has been issued by the Treasury on loans proposed to be raised by the Gas Council (H.C. 57 of 1960–61).

Transport

Guarantee. A statement has been issued by the Treasury on loans proposed to be raised by the British Transport Commission (H.C. 62 of 1960–61).

Reorganisation. On January 30, 1961, the House of Commons debated the proposals of the Government for the reorganisation of the Nationalised Transport Undertakings (Cmnd. 1248; see [1961] P.L. 88) (633 H.C. Deb. 615–732). On March 13, 1961, the House of Lords debated the same topic (229 H.L. Deb. 661–758). On March 15, 1961, the Minister of Transport made a statement about the initial steps the Government proposed to take in the reorganisation of the British Transport Commission. Sir Brian Robertson, the present chairman, will retire on June 1, 1961, and Dr. Robert Beeching has been appointed Chairman-designate of the new Railways Board at £24,000 a year (636 H.C. Deb. 1400–1413; 229 H.L. Deb. 879–884). On March 21, 1961, the House of Commons rejected an Opposition motion deploring the statement of the Minister of Transport on this appointment (637 H.C. Deb. 223–340).

Parliament

Closure

On February 13, 1961, an Opposition motion regretting "the action of the Chairman of Ways and Means in accepting a Motion for closure of debate on the Ways and Means Resolution during the sitting of February 8, 1961, when large numbers of Members still wanted to speak and the Minister had not yet replied to points made during the debate" was defeated (634 H.C. Deb. 1025–1070).

Estimates Committee (House of Commons)

Reports. The Committee has published its First Report (Supplementary Estimates) (H.C. 128 of 1960–61).

The Committee has also published its Sixth Special Report (Historic Buildings and Ancient Monuments—Observations of the Minister of Works) (H.C. 91 of 1960–61) and its Seventh Special Report (Central Office of Information—Observations of the Treasury) (H.C. 129 of 1960–61).

On February 14, 1961, the House of Commons, in Committee of Supply, debated the First Report from the Select Committee on Estimates in the 1959–60 Session of Parliament relating to the Admiralty Headquarters Organisation (H.C. 249 of 1959–60) and the Third Special Report of the Estimates Committee (H.C. 11 of 1960–61) (634 H.C. Deb. 1249–1326). On the same day, the House of Commons, in Committee of Supply, debated the Fifth Report from the Select Committee on Estimates in the 1959–60 Session of Parliament relating to Historic Buildings and Ancient Monuments (H.C. 274 of 1959–60) and the Sixth Special Report of the Estimates Committee (H.C. 91 of 1960–61) (634 H.C. Deb. 1327–1366).

Members' Fund

The House of Commons Members' Fund Report, stating the general financial position of the Fund as at September 30, 1960, has been published (H.C. 75 of 1960–61). The Accounts of the Fund 1959–60 have also been published together with the report of the Comptroller and Auditor-General thereon (H.C. 136 of 1960–61).

Offices (House of Lords)

Report. The Second Report from the Select Committee has been published (H.L. (48) of 1960–61) and approved by the House of Lords on March 28, 1961 (230 H.L. Deb. 47–48).

Prerogative of Mercy

On February 7, 1961, the Speaker ruled that a question sought to be put down by Mr. Sydney Silverman asking the Home Secretary to order an inquiry into whether a miscarriage of justice had occurred in the case of

George Riley, a man convicted of capital murder, was not in order (634 H.C. Deb. 214–222). On February 16, 1961, a motion dissenting from the Speaker's ruling as imposing "new, unnecessary and undesirable limitations on the ability of Members to discharge their public duties" was defeated (634 H.C. Deb. 1773–1841). On February 28, 1961, the Prime Minister, in an oral answer, declined to take steps to transfer the responsibility for advising on the exercise of the Royal Prerogative from the Home Secretary to a Committee appointed by and responsible to Parliament (635 H.C. Deb. 1370–1371).

Privilege

Mr. Thorpe. On March 9, 1961, following an apology and explanation by the *Daily Express*, the Speaker did not rule on whether a report in that paper concerning alleged statements by Mr. Thorpe in the Estimates Committee constituted a breach of privilege (636 H.C. Deb. 482–3, 694–5).

Viscounty of Stansgate. The report from the Committee of Privileges, together with the proceedings of the Committee and Minutes of Evidence and Appendices, on the petition that Mr. Wedgwood Benn be not disqualified from sitting in the House of Commons, has been published (H.C. 142 of 1960–61). The Committee's conclusions were that Mr. Wedgwood Benn was disqualified from membership of the House of Commons on November 17, 1960, by succession to the Viscounty of Stansgate, that the Instrument of Renunciation executed by him has no legal effect since a Peer cannot surrender or renounce his peerage, and that the issue of a writ of summons to him to attend the House of Lords would not raise any question of privilege. The Committee did not recommend the introduction of a Bill to enable Mr. Benn to remain a member of the House of Commons and felt that the terms of the petition did not require them to express any view on whether legislation to enable those who succeed to peerages to remain members of, and to be eligible for election to, the House of Commons is desirable.

On March 27, 1961, the Speaker ruled that until the House rules otherwise Mr. Benn may not occupy any of the seats reserved for Members or enter the Division lobbies of the House of Commons (637 H.C. Deb. 957–958).

Public Accounts Committee (House of Commons)

Report. The First Report from the Committee (1960–61 session) has been published on Excess Votes (H.C. 103 of 1960–61).

Statutes

Royal Assent. The Electricity (Amendment) Act, 1961 (see above, p. 196), and the Diplomatic Immunities (Conferences with Commonwealth Countries and Republic of Ireland) Act, 1961 (see below, p. 203), received the Royal Assent on March 2, 1961.

Public Authorities

Iron and Steel Holding and Realisation Agency

Accounts of the transactions of the Iron and Steel Realisation Account and of the receipt and disposal of securities coming into the hands of the Treasury or their nominees, 1959–60, together with the report of the Comptroller and Auditor-General thereon have been published (H.C. 38 of 1960–61).

Debate. On March 23, 1961, the House of Commons debated the disposal of holdings by the Agency (637 H.C. Deb. 595–704).

Treasury Minutes, dated January 12, 1961 (Cmnd. 1270), and February 14, 1961 (Cmnd. 1294), have been published concerning the Agency's proposals to sell its holdings of certain securities.

New Towns

Accounts have been published showing the sums issued out of the Consolidated Fund and the advances made therefrom to development corporations in England and Wales and Scotland, 1959–60, together with the report of the Comptroller and Auditor-General thereon (H.C. 138 of 1960–61).

Sugar Board

Accounts have been published for 1959–60 together with the report of the Comptroller and Auditor-General thereon (H.C. 127 of 1960–61).

White Fish Authority

Accounts have been published for 1959–60 together with the report of the Comptroller and Auditor-General thereon (H.C. 116 of 1960–61).

Remedies

Certiorari

In R. *v.* Haverfordwest Licensing JJ. (January 27, 1961) licensing justices made a general exemption order, exempting all licensees in the Borough of Haverfordwest from closing between the hours of 3 p.m. and 6 p.m. on the day of each market and mart between April 5, 1960, and April 5, 1961. The Divisional Court (Lord Parker C.J., Salmon and Winn JJ.), allowing an application for certiorari, and finding that the justices had not applied their minds to the questions they had to consider, that they had not heard evidence as required by the Act, and that they did not seem even to have acted under the relevant provisions of the Act of 1953, *held* that, since the case was an extreme one, the justices would be ordered to pay the costs. See also *The Times*, January 28, 1961.

In R. *v.* Chertsey JJ., *ex p.* Franks (February 14, 1961) the Divisional Court (Lord Parker C.J., Winn and Widgery JJ.) *held* that the words "fine ... for every day," in section 24 (3) of the Town and Country Planning Act, 1947, tended to connote a fine for an offence on a day falling in point of date within the jurisdiction of the trial court; and that justices who had purported to impose a fine upon a defendant who had to comply with an enforcement notice, at the rate of £3 a day for 446 days, had, in exceeding the six-month period laid down in section 104 of the Magistrates' Courts Act, 1952, acted in excess of their jurisdiction. Further *held* that where the decision of the bench was announced orally it was that oral order and not the written register of conviction which an applicant for an order of certiorari must seek to quash, and as the oral decision in the present case was a speaking order giving reasons which disclosed an error of principle certiorari would go and the conviction would be quashed: [1961] 2 W.L.R. 442.

Injunction

In Attorney-General *v.* Harris (February 14, 1961) Howard J. committed defendants to prison for breach of an injunction granted by the Court of Appeal ([1961] 1 Q.B. 74; [1960] P.L. 414–415) perpetually restraining them from placing or using any stall or other article on any footway in the City of Manchester and from exposing for sale on or near any such footway any flower or other article so as to obstruct or incommode the passage of such footway, contrary to section 102 of the Manchester Police Regulation Act, 1844. See also *The Times*, February 15, 1961. The contemnors were later released: see *The Times*, February 28, 1961.

Scotland

See Courts (above, p. 180), Government Functions and Appointments (above, p. 181), National Health Service (above, p. 187), Town and Country Planning (below, p. 200).

Subordinate Legislation

Parliamentary Proceedings

Select Committee on Statutory Instruments (*House of Commons*). A Special Report of the Committee has been published showing that the number of instruments examined by the Committee for the Sessions 1957–58, 1958–59 and 1959–60 respectively were 416, 505, 495, of which two, three and nine were brought to the special attention of the House (H.C. 5–VI of 1960–61).

On January 31, February 14 and 28, and March 7, 14 and 21, the Committee considered fifty-nine, thirty-five, eleven, thirteen, one and twenty-four instruments respectively and resolved that it was unnecessary to draw the special attention of the House to them (H.C. 5–VII, 5–VIII, 5–IX, 5–X, 5–XI, 5–XII of 1960–61).

The Committee drew the special attention of the House to the Chancery of Lancaster Rules, 1961, on the ground that their form and purport called for elucidation (H.C. 5–VIII of 1960–61). The Committee also drew the special attention of the House to the National Insurance (Modification of Local Government Superannuation Schemes) (Scotland) Regulations, 1961, on the ground that their form called for elucidation (H.C. 5–IX of 1960–61). The Committee asked for memoranda from Government departments in respect of other instruments from other instruments (H.C. 5–X and 5–XII of 1960–61).

Special Orders Committee (*House of Lords*). In the Fourth, Fifth, Sixth and Seventh Reports the Committee examined four instruments. The Committee found that the field of statutory instruments on which two instruments operate has got into such a state of obscurity that it was virtually impossible for the House to understand the amendments proposed but that no further special inquiries were necessary before the House decided whether to approve them (H.L. (33) (38) (44) (51) of 1960–61).

Town and Country Planning

Accounts

Accounts have been published of the sums issued out of the Consolidated Fund, of payments therefrom and of certain sums received, 1959–60, under the Town and Country Planning Acts, 1954 and 1959, and the Town and Country Planning (Scotland) Acts, 1954 and 1959, together with the report of the Comptroller and Auditor-General thereon (H.C. 109 of 1960–61).

Advertisement Control

Scotland. The Town and Country Planning (Control of Advertisements) (Scotland) Regulations, 1961, amend and consolidate the Town and Country Planning (Control of Advertisements) (Scotland) Regulations, 1948 to 1951. As regards areas of special control, they enable a planning authority to revoke or vary orders defining such areas and to permit a wider range of advertisements therein (regulations 10 and 11). An authority must give reasons for serving a notice requiring application to be made for express consent for the continued display of an advertisement; and if they issue a notice refusing consent, that notice may also contain a notice requiring discontinuance of the display within a stated period (regulations 8 (4) and 17). The normal period of express consent becomes five years instead of three, and the imposition of a shorter period is deemed to be a condition for which reasons must be given (regulation 18). Other amendments extend deemed consent to advertisements for inns, public-houses and agricultural demonstrations, define the types of express consent which may be given, and refer to public safety in relation to navigation (regulations 12, 17 (3) and (4) and paragraph (4) of First Schedule). Advertisement appeals are brought into line with ordinary planning appeals in that the appellant is required to state the grounds of his appeal (regulation 20 (2)), and similarly in regard to enforcement notices

(regulation 23 (3)). In regard to orders defining areas of special control, attention is drawn in the form of notice of approval to the rights conferred by section 31 of the Town and Country Planning (Scotland) Act, 1959 (Third Schedule, Form No. 2).

The Regulations incorporate the amendments made to the principal Regulations by the Amendment Regulations of 1949 and 1951, and they also make a number of textual changes to take account of the altered position since the principal Regulations were made on August 16, 1948, in regard to advertisements being displayed on that date (regulations 5 (2), 7, and 11 (4) and (5)) (S.I. 1961 No. 195).

Appropriation of Land

The Ministry of Housing and Local Government has issued a circular concerning the arrangements covering the appropriation to housing purposes of land acquired compulsorily under Part III of the Housing Act, 1957. In pursuance of his powers under section 30 (4) of the Town and Country Planning Act, 1959, the Minister has given to every local authority any consent required from him under section 23 (2) of the Town and Country Planning Act, 1959, in respect of the appropriation to the purposes of Part V of the Housing Act, 1957, of any land acquired in the exercise of compulsory powers under Part III of the Act, where the authority have stated that they intend to use the land for the purposes of Part V of the Act (Circular No. 62/60).

Compensation

A memorandum has been published of the Lord Chancellor's proposals for the consolidation of certain enactments relating to the assessment of compensation in respect of compulsory acquisitions of interests in land (H.C. 144 and H.L. (47) of 1960–61).

Compulsory Purchase

Ultra vires confirmation. The court will quash a compulsory purchase order where the Minister confirms it on a report of his inspector which shows on its face that the use to which the acquiring authority proposes to put the land is illegal.

A local authority quite properly made a compulsory purchase order against A and B regarding certain property in which they were both interested. Subsequently the local authority agreed to let B have the property on B contributing £2,000 towards the rehousing of its occupants. That was contrary to section 47 (2) of the Housing Act, 1957, which requires a local authority to get the best possible price for land compulsorily acquired, and the facts of the bargain were set out in the inspector's report to the Minister, who nonetheless confirmed the order. *Held,* that the order was confirmed *ultra vires* and should be quashed: LONDON AND WESTCLIFF PROPERTIES *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT [1961] 1 All E.R. 610, Ashworth J.

War Damage

Accounts have been published under paragraph 21 of the Planning Payments (War Damage) Scheme, 1949, and of the Planning Payments (War Damage) (Scotland) Scheme, 1949, S.I. 1949 Nos. 2243 and 2325, of payments under section 59 of the Town and Country Planning Act, 1947, and section 56 of the Town and Country Planning (Scotland) Act, 1947, and of sums issued out of the Consolidated Fund under sections 67 and 64 of those Acts respectively in connection with such payments, for the year ended March 31, 1960; together with the report of the Comptroller and Auditor-General thereon (H.C. 117 of 1960–61).

See also LOCAL GOVERNMENT (above, p. 184), and TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 202).

Tribunals and Judicial Functions of Ministers

Council on Tribunals

Air Operators' Certificates. The Tribunals and Inquiries (Air Operators' Certificates) Order, 1961, brings under the supervision of the Council on Tribunals persons appointed by the Lord Chancellor, the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland to hear appeals from decisions of the Director of Aviation Safety relating to air operators' certificates, and provides for an appeal on a point of law from any person so appointed to the High Court, the Court of Session or the High Court in Northern Ireland (S.I. 1961 No. 153).

Chairman. On January 11, 1961, Lord Tenby was appointed Chairman of the Council on Tribunals.

Reference of case to Lord Chancellor. On March 16, 1961, the Lord Chancellor, in an oral answer, said that the case of *Buxton* v. *Minister of Housing and Local Government* [1960] P.L. 418 had been referred to him by the Council on Tribunals (229 H.L. Deb. 9545). On March 21, 1961, the Minister of Housing and Local Government, in an oral answer, stated that he did not think there was a case for allowing people other than those with legal rights over land or the planning authority to apply to the High Court to have a decision of the Minister quashed (637 H.C. Deb. 182–184).

Revenue Tribunals

The Tribunals and Inquiries (Revenue Tribunals) Order, 1961, has been made. The effect of this order is to require the Special Commissioners of Income Tax to furnish a statement of the reasons for their decision, if so requested, in any case in which a re-hearing by the tribunal constituted for the purposes of section 28 of the Finance Act, 1960, may be required, while excluding that tribunal from the obligation to furnish a statement of reasons.

Wales

Developments and Government Action

The Wales and Monmouthshire: Report on Developments and Government Action, 1960, has been published (Cmnd. 1293). The report, the fifteenth of the series, reviews the year's progress in employment and industrial development; agriculture, fisheries, forestry and rural industries; education, research, health, housing, planning and public services; insurance, pensions and national assistance, communications, cultural activities and civil defence.

See also Education (above, p. 180).

Wireless and Television

Debate

On March 1, 1961, the House of Lords debated the Reports and Accounts of the B.B.C. (Cmnd. 1174) and the I.T.A. (H.C. 1 of 1960–61) and policy in Sound and Television Broadcasting (229 H.L. Deb. 79–221).

Pilkington Committee

On March 17, 1961, the Postmaster-General, in a written answer, announced three resignations from membership of the Committee and the appointment as a member of Professor F. H. Newark, Professor of Jurisprudence at Queen's University, Belfast (636 H.C, Deb. 156).

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Colonial Development

Accounts have been published of the receipts and payments of the Secretary of State for Commonwealth Relations and the Colonial Secretary in respect of loans for approved colonial development programmes, 1959–60, together with the report of the Comptroller and Auditor-General thereon (H.C. 72 of 1960–61).

Accounts have been published of the receipts and payments of the Secretary of State for Commonwealth Relations and the Colonial Secretary in respect of the Colonial Development Corporation, 1959–60, together with the report of the Comptroller and Auditor-General thereon (H.C. 73 of 1960–61).

Diplomatic Immunities

The Diplomatic Immunities (Conferences with Commonwealth Countries and Republic of Ireland) Act, 1961 (9 & 10 Eliz. 2, c. 11), received the Royal Assent on March 2, 1961.

This Act gives diplomatic immunity to certain representatives of Commonwealth governments and of the government of the Republic of Ireland attending conferences with H.M. Government and their staffs, and provides for publication in the *London, Edinburgh* and *Belfast Gazettes* of the names of such persons and the date on which their inclusion in the list became effective (s. 1). The Act applies to Canada, Australia, New Zealand, the Union of South Africa, India, Pakistan, Ceylon, Ghana, the Federation of Malaya, Nigeria, the Federation of Rhodesia and Nyasaland and the Republic of Ireland (s. 1 (5)), and may be extended by Order in Council to other Commonwealth countries (s. 2).

The Act, which extends to Scotland and to Northern Ireland, came into operation on March 2, 1961.

Legal Education

Denning Committee Report. Proposals for the reshaping of legal education for African students, both in the United Kingdom and in United Kingdom dependencies in Africa, are contained in the "Report of the Committee on Legal Education for Students from Africa" (Cmnd. 1255). The committee, set up by the Lord Chancellor in October, 1960, was under the chairmanship of Lord Denning.

The report states that "the great need in most of the territories is to train Africans to take their proper part in the administration of justice. One territory after another is gaining independence or looking forward to it. On the transfer of power the territories will not only need legislators and administrators. They will also need judges and lawyers. And these should, as far as possible, be fairly representative of the community as a whole."

Figures quoted in the report show that of the 438 African law students admitted to study in the United Kingdom in 1959 (mainly in the Inns of Court in London) 371 came from West Africa, fifty-nine from East Africa and eight from Central African dependencies. While the West African students were nearly all Africans, the students from East and Central Africa were nearly all European or Asian. This reflects the pattern in the legal profession in these territories at present: in West Africa there are many African lawyers, in East Africa very few. In the Eastern and Western Regions of Nigeria, in Sierra Leone and the Gambia, "there are distinguished African judges, able law officers and respected magistrates." In Nigeria as a whole African barristers are estimated to number 700 but in the Northern Region there

are less than ten northerners qualified to practise law. The majority of legal practitioners in East Africa are European or Asian. Most of the judges, law officers and magistrates come from the United Kingdom, and most of the practising lawyers are Indians or Pakistanis. Out of over 300 qualified lawyers in Kenya, for example, less than ten are African; out of 150 in Uganda, only twenty are African; and out of 100 in Tanganyika only one is African. In Northern Rhodesia and Nyasaland the picture is much the same. The committee considers legal education for African students under three headings: Higher Legal Education in England, Higher Legal Education in Africa, Basic Legal Education in Africa. Its main recommendations are summarised below.

The Inns of Court should be invited to revise their conditions of entry so as to ensure that no student is admitted who has not sufficient general education to be able to pass the Bar examinations. The Council of Legal Education should be invited to remodel the Bar Examinations so as to include alternative subjects more suited to the needs of students from overseas. The Council of Legal Education and the Law Society should be invited to introduce a substantial period of practical training so as to fit a student from overseas for practice in a territory where the profession is "fused." The General Council of the Bar and the Law Society should encourage their members, barristers and solicitors respectively, to take pupils from overseas for a period of six months. Steps should be taken to ensure that a man is not allowed to practise in Africa unless, in addition to passing the Final Bar Examination, he has done a substantial period of practical training in England or in the territory where he intends to practise. Adequate accommodation should be provided for students from overseas attending the Inns of Court, not only for lectures and classes, but also for their social activities.

The Faculty of Law (which it is proposed to set up in Tanganyika) should be started with all possible speed. Law teachers should be lent on "secondment" to help the new universities in Africa to staff the Faculties of Law which are to be established there. One year's practical training should be provided for students after they have taken their degrees in law; and schools of law should be set up for the purpose. The qualification to practise should be uniform throughout the territories of East Africa.

Steps should be taken in each territory to set up at once an institute where basic legal training can be given to the judges and staff of African courts, to advisers of African courts, to administrative officers and police officers, and to students for Part I of the Bar Examination. The committee's recommendations concerning the measures which might be taken in African countries are addressed only to the authorities of those territories for which the Government of the United Kingdom has a responsibility (Commonwealth Survey C.O.I., January 31, 1961).

On January 31, 1961, the Lord Chancellor, in an oral answer, stated that he had commended the Committee's recommendations relating to legal education in England to the Inns of Court, the General Council of the Bar, the Law Society and the Council of Legal Education for their consideration. As to the Committee's recommendations relating to legal education in Africa, copies of the report had been sent to the various governments of the Africa territories (228 H.L. Deb. 89–93; see also 229 H.L. Deb. 603–606).

See also South Africa (below, p. 218).

Aden

Constitutional Progress

The revised constitution for Aden Colony has been in operation since January 1959. During that time unofficial "Members-in-Charge" have been responsible for the medical, labour, local government, public works, education and postal departments.

In December 1960, the Governor transferred to the "Members-in-Charge"

the further responsibilities of the prisons, civil aviation, immigration, and public relations departments. Speaking in the Legislative Council on January 16, 1961, he said: "These steps follow the general pattern to be found in territories which are advancing on the constitutional road where it is the policy of Her Majesty's Government to devolve greater authority to local political leaders. The position has thus been reached whereby in the majority of government departments and in a wide range of public affairs the responsibility for administering and for the evolution of policy lies with representatives of the people, rather than with senior permanent officials."

The Governor said that he considered, in view of these developments, that the title of "Member-in-Charge" no longer corresponded to the status enjoyed by the non-official members of the Executive Council and to their responsibilities. "I am, therefore, very pleased to be able to inform you, with the Secretary of State's approval," he said, "that it has been decided that the title of 'Member-in-Charge' should be changed to that of minister, and the necessary amendment to Royal Instructions is being submitted for Her Majesty's approval. The title of minister will more faithfully represent the actual powers and responsibilities that are carried by these positions and will mark the beginning of a ministerial system."

The lifetime of the present Legislative Council, which has a majority of elected members, is not due to expire until January 1963.

(Commonwealth Survey C.O.I., January 31, 1961.)

Additional Instructions, dated January 17, 1961, issued to the Governor of Aden, amends certain clauses in the Aden Colony Royal Instructions, 1937.

Bahamas

Colonial Report

The Reports for 1958 and 1959 have been published by the Colonial Office (H.M.S.O. 58–1–2–59).

Basutoland, Bechuanaland and Swaziland

Additional Instructions

The High Commission Territories Additional Royal Instructions, 1960, dated December 21, 1960, amend the High Commission Territories Royal Instructions, 1959.

Bechuanaland

The Bechuanaland Protectorate (Constitution) Order in Council, 1960, establishes an Executive Council and a Legislative Council for Bechuanaland and makes provision for a new Constitution for the Territory (S.I. 1960 No. 2416).

High Commissioner

The Basutoland, Bechuanaland Protectorate and Swaziland (Office of High Commissioner) (Amendment No. 2) Order in Council, 1960, amends the Basutoland, Bechuanaland Protectorate and Swaziland (Office of High Commissioner) Order in Council, 1959, consequent upon the grant of a new Constitution to Bechuanaland, by specifying the powers under that Constitution which the High Commissioner may not delegate to the Resident Commissioner of the Territory (S.I. 1960 No. 2417).

British Guiana

Colonial Report

The Report for 1959 has been published by the Colonial Office (H.M.S.O. 58–1–7–59).

Electoral Provisions

The British Guiana (Electoral Provisions) Order in Council, 1960, makes provision relating to the election of members to a new Legislative Assembly which it is proposed should hereafter be established for British Guiana. It provides for the division of the territory into electoral districts by the Governor and for the qualifications and disqualifications of electors and, subject thereto, enables the existing Legislature of the territory to make provision for the election of such members (S.I. 1960 No. 2412).

Cameroons

Colonial Development Corporation

On February 9, 1961, the Minister of State, the Colonial Office, stated that, in the event of the Southern Cameroons deciding at the forthcoming plebiscite to federate with the Cameroun Republic, the Colonial Development Corporation's financial investment in the Cameroons Development Corporation would not be affected. However, should circumstances then so develop that the state of the latter Corporation's affairs is materially altered, the Colonial Development Corporation are in a position to reconsider their commitments (228 H.L. Deb. 497–499).

Emergency Powers

The Emergency Powers (Amendment) Order in Council, 1961, amends the Emergency Powers Order in Council, 1939, in relation to the trust territory of the Cameroons under United Kingdom administration. This amendment is consequential upon the separation of the Cameroons from the Federation of Nigeria which became independent on October 1, 1960 (S.I. 1961 No. 61).

Plebiscites

In the plebiscites held in February in the two sections of the Cameroons administered by the United Kingdom under United Nations trusteeship, the Northern Cameroons voted for union with the Federation of Nigeria by 146,000 votes to 97,000, and the Southern Cameroons voted for union with the Cameroun Republic by 198,000 votes to 56,000. In the Southern Cameroons voting was on February 11, in the Northern Cameroons on February 11 and 12. In both cases the people were asked whether they wished to attain independence by joining Nigeria, which became independent on October 1, 1960, or by joining the Cameroun Republic, the former French trust territory, which became independent on January 1, 1960. The two plebiscites were separate, in accordance with a resolution adopted by the General Assembly at its thirteenth session in February and March 1959.

It is expected that the United Nations Plebiscite Commissioner will be sending a report on the plebiscite campaign, the conduct of the voting and its result, to the United Nations about the end of March and that it will subsequently be discussed in the Trusteeship Council and in the General Assembly.

Neither Nigeria nor the Cameroun Republic was allowed to send official missions to take part in the plebiscite campaign. Both Governments were, however, invited to send a liaison officer and six representatives of their press and radio to visit the polling stations in the North and to be present at the count. These liaison missions did not have the status of official observers, who all came from the United Nations, and took no part in the campaign beforehand (Commonwealth Survey, C.O.I., March 14, 1961).

The House of Commons debated the result of the Plebiscites on February 20, 1961 (635 H.C. Deb. 272–280).

Cyprus

British Nationality

The British Nationality Regulations, 1961, have been made. Regulations 1 to 6 prescribe the procedure for the making and registration of declarations of intention to resume citizenship of the United Kingdom and Colonies lost under section 4 of the Cyprus Act, 1960, and for the registration of persons as such citizens on application in accordance with that section. Regulation 7 provides that where a person is granted a certificate of naturalisation as a citizen of the United Kingdom and Colonies by the Governor of a territory outside the United Kingdom the Secretary of State, as well as the Governor, may extend the time within which the grantee has to take the oath of allegiance (S.I. 1961 No. 202).

Colonial Report

The Report for 1959 has been published by the Colonial Office (H.M.S.O. 58–1–12–59).

Commonwealth Membership

The House of Representatives voted on February 16 in favour of joining the Commonwealth for a period of five years, after which the House would decide whether to remain or secede. The decision was taken after an hour of debate in which little opposition was expressed. The vote was 41–9 in favour: 21 Patriotic Front, 5 AKEL and 15 Turkish members supported the resolution, the only opponents being a splinter group of nine former EOKA men. The formal application by Cyprus for membership of the Commonwealth was delivered at the Commonwealth Relations Office in London on February 23. (In July 1959, the joint council had accepted a recommendation by Archbishop Makarios and Dr. Kutchuk that Cyprus should remain in the Sterling Area for a period of not less than ten years) (Commonwealth Survey, C.O.I., March 14, 1961).

On March 13, 1961, the Commonwealth Prime Ministers accepted the request from the Republic of Cyprus for admission to Commonwealth membership.

Sovereign Bases

The Sovereign Bases of Akrotiri and Dhekelia (Appeals to Privy Council) Order in Council, 1961, makes provision for appeals from the Senior Judge's Court of the Sovereign Base Areas of Akrotiri and Dhekelia to Her Majesty in Council (S.I. 1961 No. 59).

Falkland Islands

Colonial Reports

The Reports for 1958 and 1959 have been published by the Colonial Office (H.M.S.O. 58–1–13–59).

Fiji

Constitutional advance

On February 27, 1961, the Colonial Secretary, in a written answer, proposed that unofficial members of the Executive Council should be invited to undertake supervisory functions over groups of government departments, and it is hoped that, if this arrangement proves successful, it will be possible to progress to a Ministerial form of Government with executive responsibility (635 H.C. Deb. 101).

Gambia

Debate

On March 30, 1961, the House of Commons debated the Gambia (637 H.C. Deb. 1559–1580).

Gilbert and Ellice Islands

Colonial Reports

The Reports for 1958 and 1959 have been published by the Colonial Office (H.M.S.O. 58–1–18–59).

Kenya

New Constitution

Elections to the fifty-three constituency seats in Kenya's reconstituted Legislative Council were held in February 1961. Of the seats contested, ten were reserved for Europeans and ten for Asians, while thirty-three were open to candidates of any race. Of these open seats, thirty-two were won by Africans and one by an Arab.

The Legislative Council will consist of the fifty-three constituency elected members together with twelve "National" members (elected by the constituency elected members sitting as an electoral college), and those officials who hold office in the Council of Ministers (*ex officio* members). Of the "National" members, four are Africans, four Europeans, two Asian non-Moslems, one an Asian Moslem and one an Arab. The Governor will retain the right to nominate members if he considers this is necessary to secure a working majority.

The new Council of Ministers will have twelve members, of whom four will be officials. The racial composition of the non-official membership is not stated in the Order in Council, but at the Lancaster House conference it was agreed that there should be four Africans, three Europeans and one Asian, and that an Arab representative should have the right of attendance.

In accordance with proposals agreed at the Lancaster House conference, the Order in Council amending the constitution contains a new section embodying certain provisions safeguarding fundamental human rights, including the protection of property and the preservation of the independence of the judiciary. In connection with the enactment of these provisions, statements were made in both the United Kingdom and the Kenya Parliaments on December 20, 1960. The following is the text of the statement made in the House of Commons by the Secretary of State for the Colonies:

"At the Lancaster House conference there were proposals from all the delegates for the enactment of a code to protect the fundamental rights of the individual, including his rights in property. Her Majesty's Government then undertook to provide for the judicial protection of human rights in the new constitution.

"Her Majesty's Government have noted increasing recognition among Kenya political leaders of the need for measures and policies which will encourage the expansion of local and overseas investment. We welcome this recognition because without security and confidence private investment in agriculture and industry will not take place, and it will also be extremely difficult to proceed with re-settlement schemes in any part of the territory for peasant and yeoman farmers. Unless these new African farmers, under settlement schemes, are assured of continuity and security of title, it is unlikely that any will take up land which will be offered by the Settlement Board. Security of title to land is an essential pre-requisite to confidence and to renewed investment and the full use and settlement of the land; this, of course, is a problem not confined to one race only, nor only to agriculture titles. As a result of land consolidation under the Swynnerton Plan, there are already over 145,000 African farmers with registered titles. Outside the coast, there are over 11,000 agricultural titles held mostly by non-Africans and over 17,000 residential, commercial and industrial titles spread among all races. At the coast, registered titles exceed 16,000. If confidence is to be won and maintained, all these must be fully secure.

"Her Majesty's Government have now completed their examination of methods of ensuring this security both up to and after independence. Detailed

provisions designed for the protection of all rights, including rights in property, have now been included in the new constitution. The results of this study will also be taken into account in any further discussions on further constitutional advance, since the continued protection of fundamental rights, including rights in property, will inevitably be an essential part of those discussions. Indeed, such protection for all individuals without regard to race, tribe or religion follows naturally from the general acceptance of the right of all to stay and take part, without fear of discrimination or victimisation, in the public and economic life of the country. Her Majesty's Government considers it is its duty to promote the general acceptance of these rights."

(Commonwealth Survey, January 17, 1961.)

Malta

Blood Commission

The report of the constitutional commission appointed in July 1960 to formulate proposals for a new constitution for Malta has been published (Cmnd. 1261). The chairman of the commission was Sir Hilary Blood (a former Governor of the Gambia, Barbados and Mauritius).

A summary of the commission's principal recommendations is given in the following paragraphs.

The new constitution should provide for Malta to be described as "The State of Malta."

The position of the Governor should be approximated, so far as is possible in present circumstances, to that of a constitutional monarch. Subject to the other recommendations concerning certain specific matters, the Governor would act on the advice of the Cabinet.

There should be a Legislative Assembly not exceeding fifty members, elected by universal suffrage, under the present form of proportional representation. This legislature should have full powers to legislate for the peace, order and good government of Malta on all subjects, including defence, external affairs and internal security, subject only to the provisions of the constitution itself and to the concurrent power of the United Kingdom Commissioner in relation to defence and external affairs.

The Cabinet should consist of the Prime Minister and not more than seven other ministers and should have the general direction and control of the Government of Malta and be collectively responsible to the Legislative Assembly. The appointment of the Prime Minister and other ministers would follow the practice established in the United Kingdom.

The United Kingdom Government should be represented in Malta by a United Kingdom Commissioner with the functions and powers necessary to the discharge of the United Kingdom Government's responsibilities relating to concurrent subjects. He would have the right to see relevant Cabinet papers and he would have the ordinary immunities of an ambassador.

In order to discharge its defence responsibility, and for the fulfilment of its Commonwealth and international obligations and interests, the United Kingdom should be entitled to occupy and control such bases and military installations as it requires. The United Kingdom Government should be entitled to request the Maltese Government, through the United Kingdom Commissioner, to take any action deemed necessary by the United Kingdom Government in order to enable them to discharge their responsibilities for defence and external affairs. The United Kingdom Government should also be entitled to request the Maltese Government to desist from taking any action which the United Kingdom Government deems to be prejudicial to their discharge of these responsibilities. In the event of the Maltese Government refusing or neglecting within a specified time to meet such a request, the United Kingdom Commissioner should be empowered to make an Order which should have the force of law. This Order should prevail over local legislation

and should not be subject to challenge in the courts. The Maltese Government should be empowered to exercise delegated authority to apply for full or associate membership of the United Nations special agencies and similar international organisations and to enter into technical, financial and trade, and emigration agreements with Commonwealth and foreign states, international organisations and other territories, but the United Kingdom should retain the right of veto to ensure that Malta does not enter into agreements conflicting with the United Kingdom's existing international obligations or general international policy.

If the "concurrent powers" arrangement is to work satisfactorily and friction is to be reduced to a minimum, there must be satisfactory arrangements for consultation between the Maltese Government and the United Kingdom Commissioner. A Consultative Council should be established under the chairmanship of the Governor and composed of the Maltese Prime Minister and one other minister, and of the United Kingdom Commissioner and one other United Kingdom representative.

Judges should be appointed by the Governor on the advice of the Cabinet.

A Public Service Commission should be provided for in entrenched provisions in the new constitution. Appointments to the commission should be made by the Governor after consultation with the Prime Minister.

The Maltese legislature should have exclusive power to legislate on internal security matters. The Commissioner of Police should be ultimately responsible to the Governor but this would be an interim measure and there should be provision in the constitution for the delegation of this responsibility by the Governor in his discretion to the Maltese Cabinet.

English and Maltese should be the official languages of the State of Malta.

The constitution should include a declaration of human rights modelled on the United Nations Declaration of Human Rights. Provisions regarding religious freedom and compulsory acquisition of property should be included and the High Court should have special jurisdiction to provide redress against infringement of human rights.

The Governor should have powers of reservation for Bills affecting the discharge by the United Kingdom Government of its responsibilities for defence and external affairs or any Bill affecting internal security, currency stability, the entrenched provisions of the constitution, the police ordinance, the broadcasting ordinance, the dockyard ordinance and loans ordinances. The United Kingdom Government should also have power to disallow laws relating to Malta Government Stock.

The Parliament of the United Kingdom should retain the power to legislate for Malta on all matters. The commission hopes that it will be unnecessary for these powers to be exercised except with the consent or at the request of the Maltese Government but it feels that it cannot exclude the possibility of a repetition of the kind of emergency which has arisen in the past.

In a statement on March 8, 1961, in the House of Commons to mark the publication of the report, the Secretary of State for the Colonies, announced that the Government had decided to accept the commission's recommendations as the basis for the next Maltese constitution. Mr. Macleod said: "The drafting of constitutional instruments will now be put in hand. I hope that it may be possible to hold elections before the end of the year. The broad effect of the commission's recommendations is that the Maltese Parliament and Government will be responsible for domestic matters, including, with the reservation I mention later, internal security. In addition—and this is an innovation going much beyond the 1947 constitution—the Maltese Government will be given concurrent powers in the field of foreign affairs by specific delegation, and in that of defence. Because of our ultimate responsibility for defence and external affairs, Her Majesty's Government will also retain powers in those two fields, Her Majesty's Government's view prevailing in the event of conflict.

"This arrangement, given reasonable co-operation between the two parties, should enable differences over defence and foreign affairs to be kept to a minimum. The consultative machinery recommended by the commission will ensure that decisions in these fields are based on adequate information and discussion and, it is hoped, help to prevent disagreements arising or, if they arise, facilitate their settlement. This is a break with the long tradition of diarchy in Malta, which, the commission is convinced, is no longer practicable. . . .

"The commission makes it clear that the record of past political interference with the police, and the necessity to exclude political and other undesirable influences, compel it to recommend that the Commissioner of Police, in whom the day-to-day responsibilities for the administration and operation of the force is vested, should, for the time being, be ultimately responsible to the Governor. Her Majesty's Government accept this recommendation. . . .

"The constitution proposed by the commission . . . will enable Malta to enjoy once more a very substantial degree of self-government. Our aim is to establish . . . a partnership between Malta and the United Kingdom. This partnership will work only if both partners want it to work and are ready to co-operate with each other in ensuring that it does work. I offer Her Majesty's Government's full co-operation and I know that the House will join me in the sincere hope that the same co-operation will be forthcoming from the duly elected Maltese leaders. Her Majesty's Government believe that, given the necessary degree of mutual confidence between the two partners, the constitution proposed by the Blood Commission provides the best way in which elected government and self-government can be restored in Malta."

In reply to questions from Mr. Gaitskell, the Leader of the Opposition, the Colonial Secretary made it clear that he did not regard this as the final stage in Malta's constitutional development. Although he emphasised the unhappy record that Malta has had with constitutional conferences, he welcomed Mr. Gaitskell's suggestion that the principal political parties, which had refused to give evidence before the commission (the Labour and Nationalist Parties), and other parties might confer with him.

(Commonwealth Survey, C.O.I., March 14, 1961; 636 H.C. Deb. 471–477, 666–668; 229 H.L. Deb. 394–397.)

Mauritius

Colonial Report

The Report for 1959 has been published by the Colonial Office (H.M.S.O. 58–1–28–59).

North Borneo

Colonial Report

The Report for 1959 has been published by the Colonial Office (H.M.S.O. 58–1–50–59).

Rhodesia and Nyasaland

Debate

On March 7 and 8, 1961, the House of Lords debated the situation in Central Africa (229 H.L. Deb. 279–301, 305–393, 398–508).

Northern Rhodesia

Constitutional proposals for Northern Rhodesia, drawn up by the United Kingdom Government, are designed to secure a substantially increased number of African members in the Legislative Council and at the same time to maintain the principle of a non-racial political approach in which political parties would be obliged to seek support from both Africans and Europeans.

This was stated by the Secretary of State for the Colonies when he described the main features of the constitutional proposals in the House of Commons on February 21, 1961 ("Northern Rhodesia: Statement by the Secretary of State for the Colonies on Proposals for Constitutional Change," Cmnd. 1301).

The Secretary of State explained that the Northern Rhodesia constitutional conference which concluded at Lancaster House, London, on February 17, had not been able to reach agreement, and that it had therefore become necessary for him to put forward a plan on behalf of the United Kingdom Government. A record of the proceedings at the conference, together with details of the constitutional proposals, was published as a United Kingdom White Paper ("Northern Rhodesia: Proposals for Constitutional Change," Cmnd. 1295), from which the following information is taken.

The first part of the conference which opened on December 19, 1960, was attended by delegations representing the main political parties in Northern Rhodesia, by representatives of Chiefs, and by independent members of the Legislative Council, as well as by officials from Northern Rhodesia and representatives of the Colonial Office.

At the first plenary meeting the Secretary of State set out certain broad considerations which he felt might guide the delegates in the problems of planning the next stage in Northern Rhodesia's political advance. These were, briefly, that a substantial increase in the number of Africans in the legislature was desirable and should be achieved by some means which would be non-racial in its approach to politics; that there should be an extension of the franchise; that, although the Executive Council should continue to be advisory to the Governor and to contain some official members, the elected members in it should reflect the composition of the Legislative Council; that the Governor should retain some power of nomination to the Legislative Council; that the time had come to consider drawing up a Bill of Rights for the protection of the individual and of minority groups; and that the Chiefs of Northern Rhodesia should have some special place in the central councils of the Government.

In the course of general discussions which followed, the representatives of the various political groups gave their views. These showed wide divergencies on all the main issues, and when the conference adjourned before Christmas no reconciliation had yet proved possible.

The conference was re-convened on January 30, 1961, but delegates from the UFP and the DP did not attend. The Secretary of State explained that, in so far as their non-attendance was connected with consultation between the United Kingdom Government and the Government of the Federation, the United Kingdom Government was under an obligation to seek the views of the Federal Government before recommending any constitutional change in any part of the Federation, and this obligation had been carried out since the previous session of the conference. He stressed that no firm constitutional scheme had been put forward but that the broad lines of the United Kingdom Government's approach to the problem had been communicated to the Federal Prime Minister, Sir Roy Welensky.

Subsequent discussions with delegations attending the resumed conference failed to reveal any possibility of bridging the wide disparity of view between the various groups and communities in the territory, and the Secretary of State accordingly put forward the United Kingdom's proposals for constitutional change. These were as follows.

There are at present twenty-two elected, two nominated and six official members. It is proposed that the elected membership should be increased and should be composed of three elements: a number of members elected by voters on an upper roll, an equal number of members elected by voters on a lower roll, and a substantial number of seats in which candidates would have to obtain some support from voters on both rolls. A possible division

of these three types of constituency would be fifteen on the upper roll, fifteen on the lower roll, each roll voting separately, and fifteen "national" constituencies where, to qualify for election, a candidate would have to obtain a prescribed minimum percentage of the votes cast on each roll.

In addition to the elected members there would be up to six official members, as at present, and the Governor would retain the power to nominate members. This power would, however, be used sparingly.

Northern Rhodesia at present has a common electoral roll with a qualitative franchise and a temporary "special" roll of voters with a lower set of qualifications.

For the proposed new lower roll there would be certain adjustments of the income and educational qualifications at present required of voters on the "special" roll, together with the addition of certain categories of voters who hold special offices or special qualifications but cannot comply with the normal income or property requirements. An outline scheme of possible franchise qualifications for the lower roll is given in an Annex to the White Paper, and it is estimated that if this scheme were adopted the number of Africans eligible to register in 1961 would be about 70,000.

For the upper roll it is not intended that there should be any major changes in the qualifications for ordinary voters as laid down at present; but there would be some downward adjustment of the income and educational qualifications and some additions to the categories qualifying for admission to the voters' roll. It is estimated that there are at present 25,000 Europeans, 2,000 Asians and 1,000 Africans eligible for registration on the upper roll; and that under the proposals the Government have in mind, between 1,500 and 2,000 additional Africans would become eligible.

The Executive Council would consist of three or four officials and six non-officials. It would sit under the chairmanship of the Governor and would be advisory to him. The principle of collective responsibility would be maintained, and non-official members would be expected to support the Government in the Legislative Council. In appointing non-official members the Governor would consult the person or persons appearing to command the widest measure of support in the legislature. The non-officials would include at least two African and at least two non-African members of the Legislative Council.

An advisory House of Chiefs would be established. Suggestions for its composition, functions and procedure are contained in an Annex to the White Paper.

It is proposed that the new constitution should include a Bill of Rights designed to safeguard the rights of individuals and the interests of minorities; and that consideration should also be given to the necessary machinery within the constitution to afford protection against unfair discrimination or other contravention of the rights guaranteed to individuals.

The Secretary of State reminded the conference that the application of the provisions of the United Kingdom Government's plan to Barotseland (the earliest part of Northern Rhodesia to come under British protection) would have to be discussed in separate consultation with the Paramount Chief; it was hoped to arrange these consultations in the near future.

The Secretary of State informed the conference that he would ask the Governor to give early consideration to all the matters which now needed to be worked out in detail within the framework of the United Kingdom Government's plan—the delimitation of constituencies, the way in which "national" members would be returned, and the revised franchise qualifications. The Governor, after such consultations as might be necessary with the political groups in Northern Rhodesia, would submit his recommendations to the Secretary of State, and the United Kingdom Government would then advise the Queen on the constitutional changes to be introduced.

After the publication of the proposals, the Prime Minister of the Federation of Rhodesia and Nyasaland announced his party's rejection of them, and on February 22 the five UFP ministers in the Executive Council of Northern Rhodesia tendered their resignation. A statement by the leader, Mr. John Roberts, said the proposals represented a clear departure from the principles of political progress laid down by the United Kingdom Government in 1958 (when the last constitutional proposals were drawn up).

On March 6, Sir John Moffat, leader of the Northern Rhodesia Liberal Party, and two other members of his party were appointed ministers, while the other two portfolios left vacant by the resignations are being held by an official.

On February 22, the Northern Rhodesia constitutional proposals were debated in the United Kingdom House of Commons.

Opening the debate, the Secretary of State for the Colonies referred to the news that the constitutional plan had been rejected by Sir Roy Welensky and that certain UFP ministers in Northern Rhodesia had resigned. These developments, he said, underlined the gravity of the situation.

The Secretary of State drew the attention of members to the irreconcilable views of the political groups in Northern Rhodesia and affirmed that in this situation the United Kingdom Government was right in taking a middle course between the opposing points of view. The Government had come to the conclusion that Northern Rhodesia's political problems should be approached on a non-racial basis, and he believed that the method of election of the "national" seats would prove to be "the best method that one can find for ensuring that, at the same time, one has a substantial increase in the number of Africans on the Legislative Council and one is encouraging a non-racial approach that will cut across the monolithic blocks of the two rolls."

Speaking on the relationship between the United Kingdom Government and the Government of the Federation with regard to constitutional advance in Northern Rhodesia, the Secretary of State said that there was a clear obligation to consult, but that the Federal Government had no power constitutionally either to retard or accelerate the political advancement of Africans in any of the constituent territories and had no power to interfere with the territorial Governments in this matter.

In conclusion, the Colonial Secretary referred to those people who, in their approach to colonial problems, looked for a course of action in which there was no risk. "There is no such course," he said. "There is no safety for us in any particular course. Every course that one can put forward is fraught with danger, including the one that I am recommending to the House now."

Mr. James Callaghan, leading for the Opposition, said that, whatever might be the merits of the Secretary of State's case, he had failed to get support for it from any of the major political parties in Northern Rhodesia, despite the fact that all these parties had declared themselves to be in favour of non-racial franchises and non-racial elections. He questioned whether the proposals would, in practice, be non-racial, since it would be possible for an African candidate for a "national" seat to be defeated by a European candidate who had won many fewer votes. The device of requiring that a candidate should win a percentage of votes on each roll would offset the tremendous numerical advantage Africans would have in most constituencies.

Mr. Callaghan welcomed the substantial increase into the African electorate which would result from the franchise proposals, but said that the Colonial Secretary would have to "fill out the sketch much more carefully before it can be called a plan."

He went on to speak of the influence of the Federal Government on the Northern Rhodesia constitutional discussions and, referring to the call-up of troops by the Federal Government, asked for an assurance that the United Kingdom would seek "the clearest understanding" from Sir Roy Welensky

that he would not use these troops until the United Kingdom Government asked him to use them. The United Kingdom Government would, he said, have the support of the Opposition so long as it resisted any attempt by the Federal Government to take over United Kingdom constitutional responsibilities.

Among the speakers who followed, there was general agreement that the non-racial approach to Northern Rhodesia's political problems was the right one, but considerable differences of opinion were evident as to whether the proposed plan was in fact non-racial. Strongest opposition to the proposals came from members who saw in it a departure from the principles laid down in the 1958 constitution (particularly in regard to the lowering of franchise qualifications and to the fact that the 1958 constitution, when it was introduced, was intended to operate for a considerable number of years). A further criticism was that the proposals were too complex and required further clarification before it could be seen what their probable effect would be.

Rounding off the debate, Mr. Gaitskell spoke for the Opposition and the Secretary of State for Commonwealth Relations for the Government.

Mr. Gaitskell emphasised that there was no simple solution to the problem with which the Secretary of State was confronted; but he did not think that the proposals went far enough to secure acceptance by the Africans. He did not reject the principle behind the "National" electoral roll, but he would have preferred a less complicated system—perhaps similar to that in force in Tanganyika where seats are reserved for minority communities, but voting is on the basis of a single electoral roll for all races. He criticised the way in which negotiations had been handled, resulting in a situation where the Secretary of State had lost the support of both Africans and Europeans, and he attributed this "deplorable result" to the intervention of the Federal Government. Finally, he spoke of the danger of undermining the position of the present African leaders, "men of moderate opinion," and urged the Government to stand firm on the principles of the Monckton Report.

Mr. Sandys said that in his view the constitutional plan was not necessarily bad because it had been rejected by both races in Northern Rhodesia: since in each case the reason for the rejection was that it did not give to either race a clear majority in the legislature. "In a country which is passing through a critical transition a political system which necessitates a measure of compromise between the parties is not necessarily a bad thing."

Referring to the question of responsibility for the preservation of law and order in Northern Rhodesia, Mr. Sandys confirmed that this responsibility rested with the territorial Government and thus ultimately with the United Kingdom Government. If Federal armed forces, which are under the control of the Federal Government, had to be called in to aid the police force in dealing with civil disturbances, they would operate wholly under the direction of the territorial Government.

In conclusion, Mr. Sandys said that the purpose of the new plan was to offer to all the people of Northern Rhodesia a chance to develop a political system in which they could work honourably together for the common future of their country, and he appealed to all Rhodesians of all races to make the most of this chance (Commonwealth Survey, C.O.I., March 14, 1961; 635 H.C. Deb. 323–335, 512–579; 228 H.L. Deb. 969–976).

Nyasaland

Electoral Provisions. On February 7, 1961, the Colonial Secretary, in an oral answer, said that the Nyasaland (Electoral Provisions) Order in Council, 1960 (S.I. 1960 No. 2210; [1960] P.L. 110), was based on the Report of the Working Party set up in accordance with the decision of the Constitutional Conference to study the detailed arrangements for the franchise and the elections. There was no consultation with the Executive or Legislative Councils as such (634 H.C. Deb. 197–8).

Southern Rhodesia

Constitutional Conference. After preliminary talks at the delegation level under the chairmanship of Sir Edgar Whitehead, which started on January 16, the constitutional conference resumed in Salisbury on January 30, with the Secretary of State for Commonwealth Relations, in the chair. In addition to the members of the Southern Rhodesia Government, those attending the conference included delegates representing the United Federal Party, the Dominion Party, the National Democratic Party, the Central Africa Party, the Chiefs, the coloured community and the Asian Organisation.

On February 7, it was announced that a wide measure of agreement had been achieved and that the United Kingdom and Southern Rhodesia Governments would now proceed to work out details of a new draft constitution. The Dominion Party, however, dissociated itself entirely from the report of the conference. The report of the Southern Rhodesia Conference was published as a White Paper (Cmnd. 1291) and the following are the main points of agreement:—

The conference agreed that there should be enshrined in the constitution a declaration of the rights to be enjoyed by the people of Southern Rhodesia. These rights should apply without distinction of race, colour or creed. Any law, regulation, by-law, or other subsidiary legislation, passed after the enactment of the new constitution, which contravened the provisions of the declaration of rights, should be invalid.

It should be open to any person adversely affected by a law which, in his opinion, contravened the declaration of rights, to question its validity in the courts, and there should be an ultimate appeal to the Judicial Committee of the Privy Council. A preliminary draft of a declaration on these lines, which had been prepared, would be submitted to further detailed study.

The conference agreed that, as an additional safeguard for human rights, there should be a Constitutional Council with certain advisory and delaying functions. The council would comprise about twelve persons, chosen by an electoral college. It would be the council's duty to examine any new Bill, other than a money Bill, passed by the Legislative Assembly before submission for the Governor's assent and to report whether it considered that the Bill was unfairly discriminatory or otherwise contravened the provisions of the declaration of rights. In the event of an adverse report from the Constitutional Council, it was assumed that the Legislative Assembly would normally withdraw or amend the Bill.

The above procedure would not apply to any laws or subsidiary legislation in force before the enactment of the new constitution. However, the council could draw the attention of the Legislative Assembly to any such laws which, in the opinion of the council, were inconsistent with the provisions of the Declaration of Rights and should be amended or repealed.

The conference had detailed discussions on parliamentary representation and the franchise. When the conference opened, the various groups explained their attitudes towards this problem as follows:

1. The United Federal Party, while recognising that Africans must, over the years, play an increasing part in the affairs of the country, stressed the importance of not lowering the qualifications for the franchise.
2. The Dominion Party advocated
   (a) that there should be no change in so far as this would involve a lowering of existing standards;
   (b) that the present lower roll should be eliminated; and
   (c) that the monetary qualifications should be related to the value of money.
3. The Central African Party advocated a simple franchise qualification of literacy in English and the inclusion of additional categories of persons holding responsible positions in the public service who would not necessarily be literate in English.

4. The National Democratic Party maintained that "one man, one vote" was the only realistic solution to the question of the franchise.
5. The coloured community asked that two special seats in the legislature should be reserved for them, since they considered that this was the only practical way of safeguarding their political status as a minority group.
6. The Asian Organisation accepted universal adult suffrage as the ultimate objective but considered that this should be achieved by stages.

The statement says that, having regard to the widely varying views and aspirations of the groups represented, it was not surprising that no group was able to secure the agreement of the conference to the particular system it favoured. Nevertheless, while maintaining their respective positions, all the groups, with the exception of representatives of the Dominion Party, considered that the following scheme should be introduced:

Voters would register on two rolls—those with higher qualifications on an "A" roll and those with lower qualifications on "B" roll. The franchise would be somewhat enlarged, in particular by the inclusion on the "A" roll of chiefs and headmen and by certain amendments to the "B" roll.

These "B" roll amendments would include persons over thirty years of age whose income was at the rate of £180 per annum during the six months preceding the date of their application for enrolment, or who owned immovable property worth £350; persons over thirty who had completed Standard VI education and either earned income at the rate of £120 per annum or owned immovable property worth £250; all heads of kraals with a following of twenty or more heads of families; ministers of religion.

[This "B" roll is comparable with the special low qualification for the existing common roll; this is either an annual income of £240, with literacy tests, or an annual income of £120, with two years of secondary education and two years' continuous employment.]

The Legislative Assembly would be increased from fifty to sixty-five members. Of these, fifty would be "A" roll constituencies and the other fifteen would be "B" roll constituencies.

One member would be elected for each of the fifty "A" roll constituencies by "A" roll and "B" roll electors voting together. If, however, the "B" roll votes cast should amount to more than 25 per cent. of the "A" roll votes cast, the "B" roll votes would be proportionately reduced in value, so that the total number of "B" roll votes would be equivalent to 25 per cent. of the total "A" roll votes cast in the constituency. A converse system would apply to each of the fifteen "B" roll constituencies.

It was agreed that any amendment to the constitution would require a two-thirds majority of all members of the Legislative Assembly.

For the amendment of a few basic clauses of the constitution, it would be necessary, in addition to the two-thirds majority of the assembly, to obtain either

(a) the agreement of a majority of each of the four principal racial communities voting separately in a referendum, or alternatively,
(b) the approval of the United Kingdom Government.

The latter would be at liberty to decline to give a decision, on the ground that they considered that the issue should go to a referendum. Those entitled to vote in a constitutional referendum should be the registered voters, subject to a proviso that, until there were 50,000 African voters, all Africans who are twenty-one years of age or over and who have Standard VI education should be entitled to vote.

The basic clauses of the constitution to which this special procedure would apply would include those relating to the Declaration of Rights, the Constitutional Council, the judiciary. appeals to the Privy Council and the procedure for amending the constitution.

The conference agreed that the decisions to enshrine a declaration of rights in the new constitution, to establish a Constitutional Council, and to permit appeals in this connection to the Judicial Committee of the Privy Council would provide safeguards against discriminatory legislation as fully effective as those at present afforded by the powers reserved to the United Kingdom Government.

The Secretary of State accordingly informed the conference that he would be prepared to recommend the elimination of the powers retained by the United Kingdom Government (powers to advise the Queen to withhold assent to Bills of the Legislative Assembly of Southern Rhodesia or to annul Acts already passed by it and to exercise control over matters relating to the Native Affairs Department).

In the time available the conference was not able to consider the provisions of the present constitution dealing with native reserves and the Land Apportionment Act. However, it was agreed in principle that the powers of the United Kingdom Government in relation to those matters should be eliminated, provided fully effective alternative safeguards could be devised.

The Southern Rhodesia Government asked that the United Kingdom Government should initiate legislation to provide that, in future, the United Kingdom Parliament would not legislate for Southern Rhodesia except at the Southern Rhodesia Government's request in regard to any matter within the competence of the Legislative Assembly.

The Secretary of State informed the conference that the Government would be prepared to introduce legislation to empower the Southern Rhodesia Legislature to pass laws with extra-territorial effect (Commonwealth Survey, C.O.I., February 14, 1961).

On March 23, 1961, the House of Commons debated the Report of the Southern Rhodesia Constitutional Conference (637 H.C. Deb. 705–738).

St. Kitts—Nevis—Anguilla

Colonial Reports

The Reports for 1957 and 1958 have been published by the Colonial Office (H.M.S.O. 58–1–24–58).

St. Vincent

Colonial Reports

The Reports for 1956 and 1957 have been published by the Colonial Office (H.M.S.O. 58–1–36–57).

Sarawak

Colonial Report

The Report for 1959 has been published by the Colonial Office (H.M.S.O. 58–1–33–59).

Sierra Leone

Independence

On March 27, 1961, the House of Lords debated Sierra Leone on the second reading of the Sierra Leone Independence Bill (230 H.L. Deb. 23–40). The Bill received the Royal Assent on March 28, 1961.

South Africa

Constitution

On January 23, 1961, the South African Assembly gave a first reading to the Bill to make South Africa a republic. The republic is due to be set up on May 31, 1961.

The Bill is the draft constitution of the Republic of South Africa; except for the substitution of a President for the Governor-General, and consequential amendments, there is no alteration in the present constitution. The words Crown

or King or Queen, wherever they occur in the 1909 South Africa Act (the present constitution of the Union), will be replaced by "the State." The Governor-General will become the State President and the Governor-General in Council will become the State President in Council. The executive power of the republic will be vested in the State President acting on the advice of the republic's Ministers of State.

The State President will be elected by an electoral college of members of the Senate and the House of Assembly, presided over by the Chief Justice or a Judge of Appeal. No one may become State President unless he is qualified to be nominated or elected as a member of the Senate (that is, is white, at least 30 years old and a registered voter), and he cannot become State President if, at the date of election, he holds any public office. The command-in-chief of the South African Defence Force will be vested in the State President. (Commonwealth Survey, C.O.I., February 14, 1961.)

Membership of the Commonwealth

On March 15, 1961, the Prime Minister of South Africa, at the Commonwealth Prime Ministers' Conference in London, decided to withdraw his application for the Union of South Africa to remain a member of the Commonwealth after that country becomes a Republic on May 31. The Prime Minister made a statement to the House of Commons to this effect on March 16, 1961, and on March 22, 1961 the House of Commons debated the withdrawal of South Africa from the Commonwealth (636 H.C. Deb. 1748–1753; 637 H.C. Deb. 441–532). On March 23, 1961, the House of Lords debated the matter (229 H.L. Deb. 1225–1251, 1255–1334).

South-West Africa

Mandate. On March 8, 1961, the Speaker refused to give leave for Mr. Dingle Foot to move the adjournment of the House under Standing Order No. 9 to discuss the Government's refusal to give an assurance that it would raise the future of the Mandate for S.-W. Africa at the Commonwealth Prime Ministers' Conference (636 H.C. Deb. 478–481; see also 636 H.C. Deb. 1194–1197).

TANGANYIKA

Constitutional Conference

The Tanganyika Constitutional Conference was held in Dar-es-Salaam from March 27 to March 29, 1961, under the chairmanship of the Secretary of State for the Colonies. The Conference proposed that details of the conference proceedings should be incorporated in a White Paper to be published in the United Kingdom and in a Government Paper to be presented to the Tanganyika Legislative Council at the next meeting, beginning May 16.

It agreed that at this stage the Governor, Deputy Governor and two official Ministers should no longer be members of the Council of Ministers, which should be renamed the Cabinet; the Conference further decided that the title "Chief Minister" should be changed to that of "Prime Minister" and that the Prime Minister should preside over the Cabinet.

With the introduction of self-government, many of the powers now exercised by the Governor will disappear and, in general, the Governor will act in accordance with the advice of the Cabinet. The Conference agreed that defence during this period should continue to be a reserved subject and that the Governor, while continuing to be responsible for external affairs, should arrange for Ministers to be increasingly associated with the exercise of responsibility in these fields with a view to their transfer to ministerial hands on independence.

It was decided that the Legislative Council should be renamed the National Assembly.

The Conference agreed that the Public Service Commission should become executive two months after the introduction of internal self-government and

that from that date the post of Deputy Governor, which was largely concerned with civil service matters, would be abolished. A post of Civil Secretary should be created. At the same time, the Public Service Commission would be reconstituted, appointments to it being made by the Governor in his discretion, but after consultation with the Prime Minister. It was also decided to create an executive Police Service Commission. It was agreed that a Judicial Service Commission should be established which would consist of the Chief Justice as Chairman, a serving judge of the High Court of Tanganyika, designated by the Governor and the chairman of the Public Service Commission.

The principle of a compensation scheme for officers designated under the Overseas Service Aid Scheme was endorsed by the Conference. It was agreed that the main features of such a scheme must be decided and published before full internal self-government for Tanganyika is introduced. The Conference also recognised that there were other officers serving on overseas terms for whose interests appropriate provision would have to be made before independence, and took note that discussions about the form of such provision were being separately pursued.

The Government of Tanganyika expressed its desire to continue participation in the common services provided by the East Africa High Commission and is considering ways in which this can be done in a manner compatible with the country's sovereignty. The opportunity was taken to review a number of other matters which would have to be covered in the independence constitution as well as financial matters and defence forces. It was agreed that further discussions on these topics would take place in London in the second half of June. High Commission matters would be discussed at the same time, if this was acceptable to the other Governments concerned.

The Conference agreed that the date for the introduction of full internal self-government should be May 1, 1961. It further agreed that the date of independence should be December 28, 1961, and that Her Majesty's Government should introduce a resolution at the United Nations proposing the termination of the Trusteeship Agreement at this date.

The Tanganyika Government reaffirmed its intention to apply for membership of the Commonwealth. The Secretary of State welcomed this and said, in reply, that Her Majesty's Government would be very glad to sponsor its application.

The Conference declared their faith that the close and friendly ties between the two countries, which were ensuring smooth and rapid progress to independence, would be continued in the future between an independent Tanganyika and the United Kingdom.

Uganda

Buganda

Constitutional Discussions. Following an exchange of letters in December 1960 between the Kabaka of Buganda and the Secretary of State for the Colonies, agreement in principle has been reached on the reopening of constitutional discussions between the United Kingdom Government and the Buganda Government.

Mr. Macleod's letter, which was addressed to the Kabaka and was read to the Buganda Lukiko (parliament) on December 29, represents a further step in the protracted efforts of the two Governments to reach agreement on Buganda's constitutional future. In it he refers to a memorandum addressed to the Queen by the Buganda Lukiko in October 1960, containing a plan for the termination of British protection over Buganda and for the declaration of an independent Buganda State on January 1, 1961. This proposal had already been rejected by the United Kingdom Government in a letter to the Kabaka dated December 2, in which the Secretary of State suggested that Buganda would be more likely to achieve a satisfactory relationship with the rest of Uganda by putting its point of view before the Relationships Commission and by co-operating in the plans

for constitutional advance for the protectorate as a whole than by cutting itself off.

On December 15 the Lukiko agreed to reopening of discussions, and this resolution was forwarded to the Secretary of State by the Kabaka, who emphasised his personal view that negotiations should be launched as early as possible.

The following is the text of Mr. Macleod's reply to the Kabaka:

"I acknowledge receipt of Your Highness's letter of December 17, in which you conveyed the resolution passed by the Buganda Lukiko in reply to my letter of December 2.

"I note with gratification the obvious desire of Your Highness and of the Lukiko to proceed by way of negotiation. As, of course, my letter makes clear, discussions, which could not in any event be held immediately, would not be held on the basis of the Lukiko memorandum of October 8 (containing the plan for secession). But I have been looking at the matter again, in the light of the Lukiko reply and Your Highness's comments, and I propose to consult the Governor when he comes to London early in January to discuss other matters, and to consider with him the possibility of reopening discussions, their timing and the manner in which they should be held. Such talks would have to be concerned with matters which affect only Buganda and which could properly be determined without conflicting with the later conference. I have been very glad to learn that Your Highness and Your Highness's ministers have had cordial discussions with Lord Munster and propose to see the Relationships Commission when it arrives in January, and I am sure that this constructive approach augurs well for the future."

The text of the Kabaka's letter is as follows:

"I am attaching hereto the resolution which was passed by the Buganda Lukiko which sat on December 15, 1960, to consider the reply to their memorandum addressed to Her Majesty the Queen which you conveyed to me in your letter dated December 2, 1960.

"I am pleased to endorse my own appreciation of the offer of the resumption of discussions between Her Majesty's Government and the representatives of the Lukiko; this offer being contained in the last paragraph of your letter.

"I cannot over-emphasise the extreme urgency there is about this matter and I am sure that you, too, share my anxiety to have these negotiations launched as early as possible."

The text of the Lukiko resolution, mentioned in the Kabaka's letter, is as follows:

"The Lukiko in session today, December 15, 1960, has heard the letter Number EAF. 71/6/03 of December 2, 1960, which the Secretary of State for the Colonies wrote to His Highness the Kabaka conveying Her Majesty the Queen's reply to the Lukiko's memorandum of October 8, 1960.

"The Lukiko is at one with the Secretary of State's suggestion in the last paragraph of the letter referred to above, whereupon the Lukiko agrees to reopen negotiations immediately with Her Majesty's Government concerning Buganda's sovereignty and such negotiations to be based on the Lukiko's memorandum referred to above before December 31, 1960.

"The Lukiko is confident that there will soon be resumption of goodwill and friendly co-operation that will facilitate Buganda's achievement of her sovereignty without any impediment or obstacles."

On December 31, the Lukiko, by 79 votes to 9, supported a resolution in favour of immediate secession, and that a declaration of independence was drawn up. The Governor, Sir Frederick Crawford, is reported to have replied that in view of recent pronouncements by the United Kingdom Government he could not give his approval to the resolution, which would therefore have no effect since, under the 1955 Buganda Agreement, no resolution of the Lukiko is valid unless it is approved by the Governor.

Constitutional Changes

The Uganda (Amendment) Order in Council, 1961, has been made.

The purpose of this Order is to amend the Uganda Order in Council, 1920, so as to provide that there shall be a Council of Ministers in place of the Executive Council and to make further provision relating to the constitution of the Legislative Council (S.I. 1961, No. 62).

Additional Instructions dated January 17, 1961, have been given to the Governor of the Uganda Protectorate amending the Uganda Royal Instructions, 1958.

West Indies

Constitutional Advance

The Federal Government has consulted with other West Indian Governments and with Her Majesty's Government on the matter of fixing dates for the resumption of the Inter-Governmental Conference and for the Independence Conference in London. All these Governments have expressed their firm resolve that independence be achieved with the least possible delay.

Her Majesty's Government in the United Kingdom have invited representatives of the Federal and unit Governments of the West Indies to a Conference in London opening on May 31, 1961. The objects of the Conference will be to determine a date for independence for the West Indies and to reach agreement on the form of Federal and unit Constitutions. This invitation has been accepted.

The Federal Government is convening a resumed Inter-Governmental Conference, opening on May 2, 1961, in Port of Spain, to enable the West Indian Governments to reach agreement among themselves on constitutional and other matters concerned with the structure of Federation at, and after, independence. The reports of the committees and working parties, which have surveyed a wide range of problems over the past year, will come up for final consideration.

It is expected that the decisions taken at the London Conference to begin on May 31 will provide an agreed basis on which the drafting of the Constitutions can proceed with dispatch. The decisions will be subject to such legislative approval as any participating Government on its own part considers necessary.

Order in Council

The Constitution of the West Indies (Amendment No. 2) Order in Council, 1960, dated November 30, 1960, amends the Constitution of the West Indies.

Zanzibar

Constitution

Elections to Zanzibar's Legislative Council, under a new and advanced constitution were held on January 17, when twenty-two candidates were elected, on the basis of a wide franchise which, for the first time, included women voters.

In addition to the twenty-two members, the Legislative Council will have three *ex officio* members and may have up to five appointed members. It will be presided over by a Speaker.

Under the new constitution, an Executive Council will be formed, consisting of the British Resident as President, three *ex officio* members and five non-officials, who will be designated ministers and one of whom will be appointed Chief Minister.

BOOK REVIEWS

GENTLEMEN OF THE LAW. By MICHAEL BIRKS. [London: Stevens & Sons, Ltd. 1960. xi and 296 and (index) 8 pp. plus 15 illustrations. 25s. net.]

THE ease and pleasure with which this book can be read may tempt some to describe it as a "book for the lawyer's leisure library." In so doing they would be accurate yet unjust. They would be accurate because a charming and often witty history of the solicitors' profession is an admirable bedside companion. They would be unjust because Mr. Birks has displayed a level of scholarship which is of a height uncommon amongst volumes which are lauded as suitable for the bedside table. This is a bedside book, but it is very much more besides. It is a unique, well written and authoritative treatment of its subject.

The book is comprehensive in range. In place and time it travels from the England of the twelfth century to that of the present day (with a diversion to colonial developments), whilst its characters include attorneys, protonotaries, scriveners and solicitors. In dealing with each of these Mr. Birks tells us in his preface that his preference is for the individual rather than the group, and that he has in consequence sought to tell his story in terms of actual persons. The preference and endeavour give to the work much of its charm. Who amongst contemporary practitioners could not feel sympathy for the attorney at the time of Edward II who lost his cause because he "did not know how to explain his case to counsel?" Who could not be amused by the consequences which befell the attorneys of 1339 who sought to sail across the Severn without navigational experience; by the scriveners who adopted a livery in search of status; and by the magnificent robustness which accompanied the process of striking off the rolls in the eighteenth century? The narrative's foundation upon episodes such as these and upon the activities of the individual does not however at any time suggest the scrapbook. Rather does it illustrate Carlyle's aphorism that "history is the essence of innumerable biographies."

The book is well produced on good quality paper. The index is comprehensive, and the unobtrusive documentation should prove sufficient for the purposes of the curious.

MICHAEL MANN.

RESTORING DEMOCRACY IN GERMANY—THE BRITISH CONTRIBUTION. By RAYMOND EBSWORTH. [London: Stevens & Sons, Ltd. 1960. xiv and 222 pp. 30s.]

THIS book has a twofold value: as an analysis of the influence of British precedents and of the British Control Commission on German public law; and as an exhibit, a sample of the "reforming zeal of a few experts (and many amateurs)" in the Control Commission in performing a task regarded as "a cross between that of lay missionary and technical adviser" (pp. 187, 207).

Mr. Ebsworth writes soberly and sometimes more in sorrow than in anger of the few traces of British influence to be found in the Basic Law; but the electoral law, with its single-member constituencies electing half the Bundestag (even if overall representation is proportional) remains in his view "an instance in which determined and unashamed British interference in internal German affairs in the early days of the occupation paid dividends" (p. 75). The author was himself intimately concerned with the local government school at Hahnenklee, and writes interestingly of the attempts made particularly at this local government level to erect "adequate safeguards against the re-emergence of the authoritarian

politicised official" (p. 80). In its attempts to reform the civil service, to abolish the distinction between *Beamten* wielding sovereignty and mere *Angestellten*, and to exclude civil servants from the legislatures, the British authorities had less success: but where the police were concerned, even if many of the organisational reforms introduced on British orders were reversed in the final stages of the occupation, at least a new spirit was introduced into the service: indeed

> "In the Rhineland when roads are under repair, the *Land* authorities now use diversion signs consisting of a life-size reproduction of a policeman pointing the way. This is perhaps not a very original idea, but one point is significant; the policeman is smiling. Before 1945, German policemen did not smile . . . Cannot this change in outlook be attributed to some extent to the work of our Public Safety Branch . . . ? I think it can" (p. 184).

These various facets of the work of the Control Commission are excellently told. But more significant perhaps for the historian and political scientist is the fact that the author has succeeded admirably in recapturing the fundamental attitudes that guided its work. He understands the Germans and knows how to use their good points. Although "the Germans only recognise a nationalism which is militaristic" (p. 212), "they have a natural respect for the law" (p. 140), and "the more rules they had the better. Indeed their tendency to obey the law and therefore such 'rules,' might make them better democrats" (p. 135).

> "In Lower Saxony, I myself, and I believe the *Land* election officer, Herbert Blank, very much enjoyed these first negotiations and we later became real friends. He had the usual German mania for detail and elaboration, and used to bring to our meetings sheets of figures of hypothetical election results, to show the effect of the various systems and combinations of systems which were under discussion. We must have worked out many imaginary *Landtag* elections before the real ones took place" (p. 65).

Indeed Mr. Ebsworth represents the most broad-minded and liberal wing of the Control Commission: "As we were here faced with a system which was not British but nevertheless completely democratic, we again gave way" (p. 122). And even when the Germans rejected annual local elections he is prepared to see their argument:

> "We regarded this decision as a serious snub at the time, but it is difficult now to understand why we took the reverse so badly, since we had instances from home, of councils being elected as a whole (instead of a third at the time) at three-yearly and not annual intervals. The London County Council is a case in point" (p. 61).

His great regret, shared he says by many Germans, is that after 1949 the "young men from London . . . new to post-war Germany" (pp. 207, 187) felt it necessary to withdraw all assistance from the former Control Commission to the German "democratisation" process and to "stand back and observe in silence" (p. 200) even when the Germans departed from British models. Whether the Germans should in fact have been given their head later (when British precept and example could have taken deeper root) or earlier (when the German parties themselves were full of a zeal for reform that extended far beyond political forms to the social structure as a whole) is a difficult question. It is hard to think back to the atmosphere of the early post-war years. Certainly Mr. Ebsworth must have been delightful for Germans to meet in 1945; and since we are told that he is now on the staff of the B.B.C. broadcasting to Germany we can also be sure that the innocently patronising airs that pervade the book were written tongue in cheek to represent an authentic historical reconstruction of a period that now seems very, very far away.

U. W. Kitzinger.

PUBLIC LAW

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Comment

One result of the conviction of George Blake under the Official Secrets Act was the introduction to the British public of a hitherto unchronicled instrument of Government—the Services, Press and Broadcasting Committee, a body which exists to tell the newspapers what Ministers and the Services think the newspapers should not print. That is a fairly important function in a peacetime democracy and it might have been imagined that the fame of the Committee would have been at least as extensive as that of M.I.5 or the Cabinet Secretariat. But the Committee seems not to exist in any identifiable place. It is not—unlike the University Grants Committee, the Political Honours Scrutiny Committee, the Scottish Savings Committee or the National Insurance Advisory Committee—listed amongst official bodies. It is unknown to works of reference or manuals of political science. By a judicious combination of Whitaker's Almanack and the London Telephone Directory one can communicate directly with a number of the less publicised centres of administration, such as the Joint Intelligence Bureau in Northumberland Avenue or the Amphibious Warfare Headquarters at 36, Whitehall. But not so with the S.P.B.C. Whether or not the Committee members have a fixed abode or a telephone number, they own, by inference, a teleprinter, or possibly only a typewriter used for the dispatch of "D" Notices by way of guidance to editors of the national and local press. The British press has never been entirely without guidance in matters of national interest. It received some from Mr. Stanley Baldwin on a well-known occasion in 1936 (though his co-ordinating committee of overlords was an unofficial one). The present system, so far as can be gathered, is based upon the wartime system of voluntary press restraint then backed up by the powers of prosecution and suppression contained in Defence Regulations 2C and 2D. The "D" (for "Defence") Notice originated in the Press Censorship Division of the Ministry of Information and contained a list of factual topics whose publication was considered detrimental to military security, though some subjects, such as atomic energy development, were too confidential for the "D" Notice circulation. Communication with the national and provincial

press was either by a memorandum telegraphed to editors over the Press Association tape service or by letter (newspapers were asked, for example, not to reprint the contents of British leaflets dropped on Germany). On some subjects conferences were held with a body of newspaper and periodical representatives. That body seems to have been the germ of the post-war organism. The link of continuity is provided by Rear-Admiral George Pirie Thomson.[1] Rear-Admiral Thomson retired from the service in 1939, held the office of Chief Press Censor from 1940–45 and is secretary of the present Committee. His official colleagues appear to be the Permanent Secretaries of the three Service ministries and the Ministry of Aviation, sitting with ten representatives of the various newspaper associations, the news agencies, the technical press and the broadcasting authorities.[2] It is not entirely clear what the normal mode of functioning of the Committee is, or whether there is a normal and an abnormal mode. From editorial comments it would appear that decisions to make particular topics subject to the "D" system are taken by agreement among members or between the two sides of the Committee and that sometimes the press representatives withhold their agreement or support. On other occasions the newspapers themselves may deliberately ignore a "D" Notice. Some journals, including the *Manchester Guardian*, appear to have done so in 1956 in relation to projected plans for a supersonic bomber. They wished to argue that the Government were embarking on too many different kinds of defence project. The difficulty of distinguishing between embargoes in peacetime which do and do not contain elements of policy of this kind is plain. Governments may very well be inclined to give themselves the benefit of the doubt when arguing that only the potential enemy gains from uninformed criticisms of its defence and security plans. The press is, of course, legally free to disregard "D" Notices but the Official Secrets Act would presumably be wide enough to cover any act of defiance of which the Government took a sufficiently serious view. (It was used in 1958 against two undergraduate journalists who deliberately publicised what they believed and alleged to be provocative activities of British Naval Intelligence.) Obedience to the "D" system for the press at least has all the negative advantages of the Lord Chamberlain's licensing certificates for stage plays. In the aftermath of the Blake arrest, however, the Prime Minister himself authorised the issuing of the "D" Notice and the Committee in its totality may or may not have been assembled. A letter was certainly dispatched in their name requesting that certain facts about the case should not be published. There remains much mystery about this. Editors were

[1] Address in *Who's Who*—"Barclays Bank, High Street, Lewisham." No hobbies
[2] *The Guardian*, May 12, 1961.

advised not to reprint what was being said about Blake in foreign newspapers. Since foreign newspapers are freely on sale in this country and the speculations of the *New York Times* and *Herald Tribune* were available to all, it was unclear who was being protected from whom and by what. Asked to explain the situation in the House, the Prime Minister assured the House that the delay (between the imposing of the ban and its breaking by at least one newspaper) had been valuable, and suggested that information in the foreign press might be " planted." The alleged information consisted, in the event, of statements that Blake betrayed a number of British agents and that he was himself employed by the well-known but officially non-existent sixth branch of British Military Intelligence. It is not easily conceivable how the appearance of those statements in some newspapers circulating in Great Britain and not in other newspapers circulating in Great Britain could have any violent impact on the safety of the realm.

" We do not, of course," the Prime Minister said, " discuss these matters." It ought to be remarked that what is involved here is expediency and not a principle such as is involved, for example, in Ministers not being answerable for judicial proceedings or the arrangements of nationalised industries. Ministers are clearly responsible for the secret services in all their manifestations and if " these matters " means " all things pertaining to security operations," the Prime Minister's proposition is unacceptable. Limitation of the discussion of detail in security work is not a constitutional principle in itself but a concession which rests upon the assumption that Ministers effectively control espionage and intelligence activities and that these activities do not in fact embarrass the country's international relations. This was the view which was strongly argued in the House in 1956 [3] when Sir Anthony Eden disclaimed knowledge of but admitted responsibility for, underwater activities which fulfilled neither condition.

The Underwater Detection Establishment at Portland has lately been displayed in a more passive role. (As a favoured locale for international transactions of a romantic flavour it is bidding fair to occupy the place in popular imagination lately vacated by the Orient Express.) In the report of the Romer Committee, a summary of whose findings was published on June 13, the Admiralty are criticised for failing to secure adequate supervision of security procedures in the Establishment. The Committee was appointed after an Admiralty civil servant, Henry Frederick Houghton, and four other persons were convicted of conspiracy to commit breaches of the Official Secrets Acts. The summary of findings states that no criticism can be made of

[3] 525 H.C.Deb. 5s., col. 1751.

Houghton's appointment to the Underwater Detection Establishment but it was regrettable that the Portland authorities were not informed that he had been recalled from Warsaw because of his drinking habits. Three times within the first four years of his appointment doubts were thrown upon Houghton's reliability. In 1954 his superior was informed that he was taking secret papers out of the Establishment. In 1956 he was twice brought to the notice of the authorities as a probable security risk. On the first occasion the matter was treated lightly and on the second two occasions an incomplete and misleading report was submitted to the Admiralty. It is concluded that the Captain of the Establishment and the Admiralty are to blame for the manner in which security procedures were carried out. In particular the Admiralty's method of keeping the records of its civilian staff was unsatisfactory.

Some features of the episode have a familiar ring. " A junior and inexperienced official," " a misleading and incomplete report to higher authority," " lack of liaison between the administrative branches involved." For " Portland Establishment " read " Crown Lands " and for " Admiralty," " Ministry of Agriculture," and the parallel with Sir Thomas Dugdale's sea of troubles in 1954 becomes pointed. In that instance the responsible Minister resigned. Sir David Maxwell Fyfe, speaking for the Government, said: " It has been suggested that today . . . it is impossible for the Minister to keep track of all these matters. I believe that that is a matter which can be dealt with by the instructions which the Minister gives in his Department. He can lay down standing instructions to see that his policy is carried out. He can lay down rules by which it is ensured that matters of importance, of difficulty or of political danger are brought to his attention." [4] If the Romer Report is to be believed, successive Admiralty officials were seriously to blame in this aspect of the running of the department. According to the Prime Minister, answering questions in the House on June 22, the First Lord did in fact offer his resignation. But it seems to be becoming clear that accepting resignations on matters out of which anti-Government capital can be made is an unpleasant pill best avoided. The course of wisdom is to smooth it over, express confidence in the integrity of all concerned and if necessary contradict the findings of the Committee which has just been congratulated on the excellence of its work. Thus Mr. Macmillan, having accepted the Romer Report, paraphrased its conclusions by saying that there had been no " failure of procedures " but only a failure " to have a sufficiently good organisation in some respects to make them as good as they ought to have been." But that is not what the report said.

[4] 530 H.C.Deb. 5s., col. 1291.

In reply to Mr. George Brown the Prime Minister added that " the doctrine of ministerial responsibility is well known—it is the ultimate responsibility " and (once more) " The Government as a whole are responsible." Individual responsibility as a constitutional doctrine appears to have taken its last gasp. Meanwhile the Radcliffe Committee are reading the report of the Romer Committee to see whether (*inter alia*) the procedures that did not fail can be made less likely to.

G. M.

THE HOME OFFICE AND THE PROVINCIAL POLICE IN ENGLAND AND WALES—1856–1870

HENRY PARRIS

I

THE relationship between the Home Office and the provincial police forces between 1856 and 1870 is of importance for two reasons. First it is one of the most significant aspects of police history—itself a strangely neglected aspect of British history. Secondly, it illustrates the effectiveness of two of the main administrative innovations of the nineteenth century, namely, inspection and the Exchequer grant.[1]

An Act of 1835 had required boroughs, and another of 1839 had permitted counties, to establish police forces. Little more than half the boroughs even claimed to have set up their forces within two years of the passing of the Act. Most of the remainder claimed to have done so at intervals over the next fifteen years. Inspection showed, however, that thirteen boroughs had never complied with the Act.[2] As for the counties, almost half had not adopted the 1839 Act, while some of the remainder had done so for part only of their area. Within two years of the passing of the 1856 Act, on the other hand, all the counties but one, and the great majority of boroughs, had efficient forces. The greater success of this measure may be fairly attributed to the administrative machinery which it set up.

It may be objected that the efficiency of a police force is a concept so vague that it is impossible to say when it has been achieved. In the everyday sense of the word this is true, but the Home Office used the word in a narrower and more precise way. The peace of an area might be disturbed by periodical riots,[3] a high proportion of crimes

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1 This article has benefited from the helpful criticism of Professor W. J. Mackenzie, Mr. Jack Grove and Mr. Harold Perkin, of the University of Manchester; Professor L. Radzinowicz, of the Cambridge University Institute of Criminology; and Det. Ch. Inspector A. G. Rose, of the Manchester City Police. I should like to take this opportunity of expressing my gratitude to them.

2 J. M. Hart, "Reform of the Borough Police, 1835–56," *English Historical Review*, lxx (1955), 416. Public Record Office. HO 65/3; circular to 13 boroughs, Jan. 1, 1858. In this paper, the term "borough" is used to include a few towns whose police powers originally derived either from local Acts or from the adoptive Lighting and Watching Act, 1833. Where such towns continued to maintain their own forces after 1856, their police powers were assimilated to those of boroughs.

3 *e.g.*, Guildford; PRO HO 45 OS 6640.

might go undetected,[4] police authorities might fail to co-operate with one another,[5] and still their forces be judged efficient. The Act laid down that the grant was to be paid where the force had been " maintained in a state of efficiency in point of numbers and discipline."[6] There is no doubt that want of numbers and discipline was the main deficiency in 1856, nor that improvement in these respects was the first step towards checking outbreaks of disorder. Similarly with crime; a force with too few men for basic duties could not afford to let officers specialise in detective work. Less obvious, perhaps, is the connection between inter-force co-operation and the size and discipline of the force. The basis of such co-operation was the conference point system. At a stated point on his beat, Constable X of one force would meet Constable Y of another; at intervals, superior officers would attend the points also, to ensure that they were being kept. Bad personal relations might prevent the system working perfectly; but if numbers and discipline were lacking, it could not work at all.[7] On the other hand, no increase in numbers, however great, and no standard of discipline, however stringent, could ensure the complete disappearance of riot and crime, or prevent occasional failures of co-operation. In judging efficiency, the Inspectors considered the needs of the locality in ordinary conditions, not in exceptional periods of unrest; the adequacy of the police to combat crime, not to exterminate it; and the average level of human relations between officers of neighbouring forces, rather than the bad relations which in a few cases marred co-operation.

The Inspectors judged efficiency in numbers primarily by the ratio of constables to population. It was held that the ratio should be higher in boroughs than in counties. In the latter, forces were limited to not more than one constable per thousand population.[8] In the former, on the other hand, the Home Secretary could:

> not give any sanction to the rule that a police force is to be considered sufficient in point of numbers if it is in the proportion of one man to a thousand, and he thinks that although it is possible that in some places that might be a sufficient number, experience has shown that in towns with a large and dense population a larger proportion is requisite.[9]

In practice, approved ratios ranged between very wide limits: 1:558 in the case of Liverpool to 1:2,733 in the case of Rutlandshire, for

4 *e.g.*, Essex; Parliamentary Papers, 1859, Sess. I, xxii, 418.
5 *e.g.*, Bedford and Bedfordshire; Parliamentary Papers, 1860, lvii, 535.
6 19 & 20 Vict. c. 69, s. 16.
7 PRO HO 45 OS 7206.
8 2 & 3 Vict. c. 93, s. 1.
9 PRO HO 65/3; letter to Woodford, Oct. 21, 1856.

example.[10] The Inspectors also took into account the area for which a force was responsible. A force had to be large enough, too, to co-operate effectively with its neighbours: one of the charges against Bridgnorth, for example, which failed to get a certificate until 1870–71, was that "with this small force no system of . . . co-operation with the county can be carried out."[11]

The test of efficiency in discipline was that a force should have enough superior officers to supervise the constables on duty continuously and regularly. Generally only small boroughs were ruled inefficient on this ground, though an example will be given of a county being required to appoint an extra superintendent in order to qualify for grant.

The Act provided for three Inspectors of Constabulary,[12] but at first only two were appointed. Major-General William Cartwright, a veteran of the Peninsular War and Waterloo,[13] appears to have had no police experience. Lieutenant-Colonel John Woodford, on the other hand, had been Chief Constable of the Lancashire Constabulary since its foundation.[14] They divided England and Wales between them, but decided almost at once that the third Inspector was needed. The post was given to Captain Edward Willis, Chief Constable of Manchester.[15] The district boundaries were redrawn, Woodford taking the north of England, Cartwright the Midlands, East Anglia and North Wales, and Willis the south of England and South Wales. For practical purposes, the three Inspectors were equal and independent. These arrangements were complete by the early part of 1857. During the period considered here, only one change in the district boundaries was made, namely, that in 1866–67: Nottinghamshire and Derbyshire were transferred from Cartwright's district to Woodford's. Cartwright served from 1856 until 1869 when he was succeeded by Lieutenant-Colonel Cobbe, Chief Constable of the West Riding of Yorkshire.[16] Woodford served until 1868, when Captain Elgee, who had been Chief Constable of Lancashire since 1859, took his place as Inspector of Constabulary.[17] Thus there is no truth in the assertion

10 Parliamentary Papers, 1870, xxxvi, 309; 1871, xxviii, 438.

11 Parliamentary Papers, 1865, xlv, 442.

12 19 & 20 Vict. c. 69, s. 15.

13 *Ex inf.* Mr. E. G. Forrester, of Brackley, Northants, who has made a special study of the Cartwright family.

14 Parliamentary Papers, 1852–53 (715), 2nd Report of the Select Committee on Police, 21.

15 Willis had previously been Assistant Chief Constable of the Lancs. force under Woodford.

16 *White Rose: The journal of the West Riding Constabulary*, xvi (1956) Winter, issue, 7.

17 See an article, "The Force under W. P. Elgee, Chief Constable, 1859–1868," *Lancs Constabulary Journal*, Jan. 1958.

that the early Inspectors of Constabulary lacked experience of police work.[18]

These early Inspectors were not "men from Whitehall." They lived in their districts and worked from their homes. They did not rely on the clerks of the Home Office, but engaged their own, for which they were allowed expenses.[19] Letters passing between them and the Home Office were treated as external correspondence not as internal memoranda. They did not regularly minute documents circulating in the Home Office. When the Office consulted them, it was usually as individuals on matters relating to their districts; for example, protests from local authorities which had failed to qualify for grant were normally referred to them.[20] Only occasionally were they all consulted on a point of general police interest.[21]

Thus they were independent in status—Her Majesty's Inspectors, not the Home Secretary's. The form of their reports reflects their status. Although they advocated uniform methods of keeping police records, and were officially enjoined to present their own reports in standard form,[22] they did not do so. They were capable of setting up administrative machinery independently of the Home Office. For example, forces in Cartwright's district sent him information about men dismissed, which he circulated each quarter, "by which means no constable, found unfit for one force, can enter another."[23] Moreover, the Inspectors could influence police authorities directly, apart from any action that might follow their recommendations to the Home Secretary. Between 1856 and 1871, for example, Caernarvonshire was the scene of large-scale disturbances as a result of enclosures. They were eventually brought to an end by forming the disturbed area into a separate police district with an increased establishment and higher rates than the rest of the county. The local authority was very reluctant to take this step and

> undoubtedly, the person who prevailed upon the magistrates to take a decision in the matter was Cartwright. He withheld his report to the Home Secretary until he saw what course they would take. In a letter to the chairman of quarter sessions he declared

18 J. S. Harris, *British Government Inspection* (1955), 184: "During the early years Inspectors of Constabulary . . . were in most instances retired military officers who . . . possessed little or no experience in the administration of local police forces. After the turn of the century Inspectors came to be recruited from the ranks of the Chief Constables and as a result were much better prepared to discharge their duties."

19 PRO HO 65/5; letter to Cartwright, Oct. 10, 1857.

20 *e.g.*, *ibid.*, letters to Cartwright and Willis, Dec. 26, 1857, and to Woodford, Jan. 14, 1858.

21 *Ibid.* 65/6; letters to the three Inspectors, Dec. 9 and 15, 1859, relative to value of night patrols in sparsely populated areas.

22 *Ibid.* 65/5; letter to the three Inspectors, Dec. 10, 1857.

23 Parliamentary Papers, 1860, lvii, 534.

> that a special police district was necessary: "without some understanding that some steps are taken to prevent a repetition of these offences, I cannot report the force efficient. . . ."

Faced with the loss of grant, the magistrates adopted Cartwright's suggestion.[24]

Their independent status enabled the Inspectors to act on their own initiative, to report with considerable candour, and to urge their views with vigour. But on the other hand, when major decisions were taken in the Home Office, they were not usually around. They had influence but their footsteps were rarely heard in what Sir Charles Snow calls "the corridors of power."

The Home Office was small enough—less than forty when the Act came into operation[25]—not to need an elaborate organisation for the discharge of police business. Business was handled at three levels: Police Department,[26] Under-Secretary (Permanent and/or Parliamentary) and Secretary of State. This structure corresponded to that which had been set up in the Board of Trade to deal with railway business. There, cases were first considered in the Railway Department, went next to one of the joint permanent secretaries and/or the Vice-President, and finally to the President. But there the three levels of the structure corresponded to three levels of decision. The great majority of cases were decided in the Department, most of the rest by the permanent secretary, and only a small proportion ever reached the Minister. To judge from the surviving records, however, virtually no police business was decided below Under-Secretary level, and only unimportant cases at that level.

Horatio Waddington was Permanent Under-Secretary until his death in 1867, when he was succeeded by A. F. O. Liddell. An exchange of minutes between Waddington and an anonymous clerk makes clear the responsibility entrusted to the former. "These are the fees which are always sanctioned," wrote the clerk on a scale submitted by the magistrates of County Durham; "Then sanction them in this case," ordered his superior.[27] On occasion, however, the Permanent Under-Secretary could persuade the Minister to change his mind. When Cheshire sought permission to train police in the use

[24] J. O. Jones, "The History of the Caernarvonshire Police Force, 1856–1900" (unpublished M.A. thesis, Bangor, 1956), 131.

[25] *P.O. London Directory, 1857*, 105–106; staff working outside London, such as the Inspectors of Constabulary themselves, are excluded.

[26] The evidence for the existence of a Police Department is the imprint of its stamp on many of the documents in HO 45 OS. For the Home Office's handling of police business at the lowest level, see J. M. Hart, "The County and Borough Police Act, 1856," in *Public Administration*, xxxvi (1956), 409.

[27] PRO HO 45 OS 6423.

of the rifle and to supply rifles from the police rate, the Home Secretary suggested to Waddington that they might sanction the training though not the issue of rifles. Waddington replied:

> It seems impossible to deal with this question in one county . . . only. Considered with reference to the whole kingdom it is one of the most serious nature and seems to me to be well worthy of a *Cabinet* deliberation. It has been frequently suggested to organise the Metropolitan Police *militairement* and always repudiated. It seems highly unconstitutional.

The Home Secretary saw the force of this, refused the Cheshire application on both points, and set a precedent which was followed in other cases.[28]

The role of the Parliamentary Under-Secretary is less easy to define. He minuted documents extensively and signed out-letters, though most of the latter bear Waddington's signature. Indeed, the fact that for weeks at a time the Parliamentary Under-Secretary would sign all letters suggests that he took over his permanent colleague's work during the latter's absence, as had been the case in the forties.[29]

All important cases, and many that were not, went to the Home Secretary for his personal decision, and letters might be written directly from his minute on the original document, without an intermediate drafting stage.[30] Home Secretaries were guided by certain principles as to the part the police should play in society; for example, that the police should not normally bear arms.[31] But there is no evidence that any Home Secretary in the period had any policy as to the way the police should develop. For example, it was widely felt that small boroughs should amalgamate their forces with those of the counties, and many small boroughs did so. But no Home Secretary made a determined effort to persuade them all to take this step.

The Home Secretary's role was therefore normally to decide on recommendations put before him by others, especially the Inspectors. Such recommendations either called for immediate decision or they did not. The former class was the larger, since each year the Home Secretary had to issue certificates of efficiency in respect of each efficient force. Often there were borderline cases where, as Woodford reported of Warrington in 1864–65, it would have been desirable to reserve judgment.[32] But the Treasury was waiting for a ruling, the police authority was waiting for the money, and so the Home Secretary had to decide. In this case, he decided in favour of the borough.

28 *Ibid.* 6811.
29 F. C. Mather, *Public Order in the Age of the Chartists* (1959), 46.
30 PRO HO 65/5; letter to the Earl of Sandwich, Jan. 9, 1857.
31 *Ibid.* 45 OS 7487; *cf.* 6811, as noted above.
32 Parliamentary Papers, 1866, xxxiv, 92.

Where the Inspector's recommendation was firm either way, it was unusual for the Minister not to follow it. " How could the Secretary of State report efficient against the recommendation of the Inspector?" reads an anonymous minute in one case.[33] In a sense, this was the simplest thing to do, but when it meant refusing an authority its grant, it required some courage. For authorities could almost always find spokesmen of social standing and political influence—mayors of boroughs, chairmen of quarter sessions, Lords Lieutenant, and Members of Parliament—to protest on their behalf. It is worth noting that Home Secretaries later in the century were less ready to follow the recommendations of Inspectors than during the first years of the Act's operation.[34]

When confronted with a recommendation which did not call for immediate decision, the Home Secretary could take an even easier way out by doing nothing at all, and that was generally the alternative preferred. Thus, when Cartwright recommended that gaiters should be included in the items of clothing which were eligible for grant, the suggestion was not considered on its merits. No estimate of the cost was called for. It was not even explicitly turned down. He was merely told that it would require an amendment to the Secretary of State's Rules.[35] When the Inspectors repeatedly recommended legislation to compel boroughs with populations under 5,000 to merge their forces with those of the counties, there is no evidence that their proposals were even considered at ministerial level.

The Home Office often displayed a like indifference to local authorities seeking advice. It declined, for instance, to advise on problems of superannuation arising out of the consolidation of the Gloucester city force with that of the county.[36] When the Borough of Flint proposed to amalgamate its force with the county constabulary, the question was raised " whether the borough ought to contribute in the same manner as the rest of the county towards the erection of police stations throughout the whole of the county." The Home Office declined to express an opinion for lack of local knowledge.[37] There was statutory provision for an authority to get help from a neighbouring force, though not from a distant one. Help from a distance was commonly given, however. When Caernarvonshire told the Home Office that it had secured the services of Birmingham constables in anticipation of a deluge of trippers by excursion trains, the Minister minuted: " It would be well to write some approval of this step; but the letter should be cautiously worded if there is a doubt as to the

33 PRO HO 45 OS 6642.
34 Hart, *loc. cit.*, *Public Administration*, 411–412.
35 PRO HO 45 OS 7035.
36 *Ibid.* 65/3; letter to Gloucester, July 20, 1858.
37 PRO HO 65/6; letter to Flintshire, Feb. 4, 1865.

legality."[38] It may well be that authorities should in some of these cases have sought help from Inspectors rather than from the Home Office itself. But the latter could still have performed a useful function by putting the authorities and the Inspectors in touch with one another instead of merely dismissing the queries.

II

There was statutory provision for the establishment of fifty-nine county forces, allowing for separate forces in East and West Sussex, East and West Suffolk, the ancient liberties of Peterborough and the Isle of Ely, the three Parts of Lincolnshire and the three Ridings of Yorkshire. Thirty county forces had been founded prior to the passing of the 1856 Act, but in several cases, for example, Warwickshire and Cumberland, their authority covered only a small part of the county.

In a number of instances, however, adjoining counties appointed the same Chief Constable with results similar to those which would have followed a complete merger of the forces. The Soke of Peterborough, for example, appointed the Chief Constable of Northamptonshire to command its force which in consequence

> worked precisely in the same way . . . [there is the] same system of co-operation with adjoining forces . . . the office work is done at Northampton . . . the regulations are similar to those of the county of Northampton . . . [and] the clothing is similar to the county of Northampton.[39]

Other cases of joint appointments were Cumberland and Westmorland; Cambridgeshire, Huntingdonshire and the Isle of Ely; and Herefordshire and Radnorshire, though in the last case the arrangement came to an end in 1867–68.[40]

The Parts of Lincolnshire, which have always shared a Chief Constable, provide the most important case of such co-operation. In 1859, statutory authority for a common superannuation fund was obtained,[41] and an Act of 1865 removed an anomaly by explicitly protecting the superannuation rights of men transferred from, say, Holland to Kesteven. In the words of the historian of the force, this " had the effect of consolidating the three forces." The story may be brought down to the present day in the words of the same writer.

> In 1937, a committee known as the Lincolnshire Police Committee was appointed by the three Standing Joint Committees, and they delegated to it powers to deal with the pay, allowances, pensions, clothing and conditions of service of the whole force. . . .

38 *Ibid.* 45 OS 6808.
39 Parliamentary Papers, 1859, Sess. I, xxii, 428.
40 *Ibid.* 1868–69, xxxi, 171.
41 22 & 23 Vict. c. 32, s. 22.

> There are still three Standing Joint Committees in Lincolnshire, and in effect, three police forces, but for all practical purposes there is only one force, the Lincolnshire Constabulary.[42]

Quite apart from cases such as these, county forces showed a disposition to work together. There were several police stations in which adjacent counties had a joint interest.[43] Caernarvonshire, at Cartwright's suggestion, transferred three parishes to Denbighshire for police purposes; the arrangement continued until 1879.[44]

These joint arrangements went some way towards eliminating small independent county forces. Rutlandshire was the most striking example of a small English county with its own force. Many of the Welsh county forces were, of course, small, but the advantages of amalgamation would have been less because of the large areas involved, the difficult nature of the countryside, and the backward state of communications, particularly railways, as compared with England.

All but seven of the county forces qualified for grant for at least part of the first year during which the Act was in operation. Six of the remainder qualified for grant in 1857–58, though, in the case of the East Riding of Yorkshire at least, only after protracted bargaining.[45] After the first two years, Rutlandshire alone remained inefficient[46] and few counties were ever in danger of forfeiting the Inspectors' favour during the period.

The initial differences had in almost all cases turned on the number of police needed. There can be no doubt that the influence of the Inspectors was the main factor in raising the size of establishments. Such influence was often mentioned in correspondence with the Home Office; *e.g.*, in the cases of East Suffolk and Breconshire.[47] Between 1857 and 1869, the establishment of the Caernarvonshire force rose from thirty-five to sixty; the increases " were [primarily] the result of pressure from the Government Inspector. . . . Not until 1878 did the justices of their own accord and initiative decide that . . . an increased establishment was necessary."[48] It will be shown that a substantial group of boroughs resisted for years the persuasions of the Inspectors to increase the size of their forces. Why were the counties more amenable? Part, at least, of the answer seems to be that in the counties the Chief Constable was sufficiently independent in status to play an important role in negotiations between central government

42 *Lincolnshire Constabulary, 1857–1957* (1957), 5–6.
43 *e.g.*, Parliamentary Papers, 1865, xlv, 414.
44 Jones, *op. cit.*, 264.
45 PRO HO 45 OS 6641.
46 *Ibid.* 7206; Rutlandshire at last qualified for grant in 1861–62; Parliamentary Papers, 1863, l, 186, 218.
47 PRO HO 65/5; letter to East Suffolk, July 31, 1857; 65/6; letter to Breconshire, Jan. 17, 1863.
48 Jones, *op. cit.*, 115–116.

and local authority. When it suited him, he was quite capable of siding with the Inspector against his own authority. Such a role is clearly apparent, for example, in a report made by the Devonshire Police Committee to the county justices in 1859:

> the Committee have considered the question of the reorganisation of the police force, and also the letter from the Government Inspector of Constabularies [*sic*], relative to the inadequacy of the force which were referred to them at the last quarter sessions, and are of the opinion that the new scheme of the Chief Constable so far as relates to the number and description of the force should be adopted. The Chief Constable informed the committee that he is quite unable to meet the wants of the various localities with the present number of constables. The committee therefore recommend an addition to the force of twenty-two constables.[49]

The report was adopted. Events in Monmouthshire, one of the counties which qualified for grant only in 1857–58, took a similar course. The Chief Constable warned the justices that the Inspector would not think the original establishment—forty-six men—enough. The justices would not increase the number, however, and failed to earn the grant. In the following year, the Chief Constable renewed his efforts with two strongly worded reports calling for more men, and got an increase from forty-six to seventy-seven,[50] as recommended by the Inspector.

It was only a short step from siding with the Inspector for the Chief Constable to use the Inspector for his own purposes, as seems to have been done in Buckinghamshire. There,

> the men were grossly overworked and in 1858, *as a consequence of agitation by Captain Carter* [the Chief Constable], H.M. Inspector of Constabulary attended one of the justices' meetings and said outright that the force was not large enough to work efficiently. . . . It was therefore agreed to increase the force by sixteen men.[51]

A borough Chief Constable was, of course, so much under the thumb of his Watch Committee that it would have been dangerous for him to attempt a manoeuvre of this kind.

Only occasionally was a county in danger of not qualifying for grant on grounds of discipline. A case relating to Cardiganshire

49 W. J. Hutchings, *Out of the Blue: History of the Devon Constabulary* (n.d., 1956?), 49.

50 Monmouthshire Archives Committee, *Exhibition of Records illustrating the Growth of the Constabulary in Monmouthshire, held at County Hall, Newport, March 25 to April 6, 1957*, not paginated [15].

51 A. G. Hailstone, *100 Years of Law-Enforcement in Buckinghamshire: an Historical Survey* (1956), 12. My italics.

illustrates how an Inspector judged the efficiency of a county force in this respect. The justices thought one superintendent sufficient; Willis thought two essential, because of the area. Between January and July 1858, the superintendent had visited twelve of the nineteen stations only once every two months; he had visited only two of his stations more than twice a month. The area per superintendent was almost twice as high as in any other county under Willis's inspection. The Home Secretary minuted:

> I have seen Captain Willis who says the stations are not and cannot be effectively visited by one superintendent and the space [?] is certainly too large. The Chief Constable, he informs me, agrees.

Therefore, there must be a second superintendent. Another Home Secretary confirmed the ruling two years later.[52]

Once efficient, county forces tended to stay efficient, though considerable pressure was needed to secure some of the increases rendered necessary by the increases in population revealed by the 1861 census.[53] In one case—Breconshire, 1866–67—a force was refused its certificate. But the point at issue was so trivial—the appointment of two constables at a net cost to the county of less than £100 a year—that the justices quickly complied and regained their grant.[54] It is, of course, true that only minimum standards could be maintained and some forces were only barely up to them. Derbyshire, for example, never actually failed to qualify for grant during the period; but when, in 1867, Glossop became a borough with its own force, Cartwright described the men released for duty elsewhere in the county as an "accession of strength which was much required."[55] He must clearly have approved the county force only by a narrow margin in the previous year.

III

The effect of the 1856 Act on the boroughs was markedly slower. Even at the end of the period there were still boroughs with no police forces in the sense which had by that time become general. And there were still boroughs—some of them large and important—which had never qualified for a certificate of efficiency.

Is the explanation to be found in the fact that the Home Secretary possessed greater powers over the counties than over the boroughs?

52 PRO HO 45 OS 6642.

53 *e.g.*, *ibid.* 65/6; letters to Pembrokeshire, Dec. 30, 1862; Breconshire, Dec. 30, 1862, and Jan. 17, 1863; Devonshire, Jan. 31, 1863, Jan. 18 and May 6, 1864; Nottinghamshire, Jan. 25, 1864.

54 Parliamentary Papers, 1866, xxxiv, 149; 1867, xxxvi, 575.

55 Parliamentary Papers, 1867–68, xxxvi, 6.

The 1839 Act empowered him to make rules for the county constabularies. Those in force during the period regulated pay, set a maximum age and a minimum height for recruits, and precluded county forces from engaging men dismissed from other forces. Justices also had to get the Home Secretary's approval for changes in establishment and when appointing a Chief Constable. There is little doubt that similar rules for borough forces would, in a general sense, have had a beneficial effect. But there is no reason to suppose that they would have made them efficient "in numbers and discipline." Inspection and grant were the means employed to raise the county forces to that level. All borough forces were liable to inspection, and all, save those boroughs whose populations were below 5,000, were eligible for grant. The question is, why were these devices less effective in the case of the boroughs than in that of the counties?

In order to answer this question it will be helpful to divide the 208 boroughs which had police powers during the first year of the Act's operation, 1856–57, into three groups. (a) Large boroughs; *i.e.*, those with a population over 20,000. This group numbered fifty-seven, rising to sixty-three after the census of 1861. (b) Medium boroughs: *i.e.*, those with a population between 5,000 and 20,000. This group numbered eighty-six, falling to eighty-five after 1861. (c) Small boroughs: *i.e.*, those with populations under 5,000. This group numbered sixty-five, falling to sixty after 1861.

The development of the police in the large boroughs was almost as satisfactory as in the counties. All had forces when the Inspectors first visited them, and the great majority qualified for grant within two years of the passing of the Act. A number were, however, slower to achieve efficiency, and four [56]—Stockport is the most glaring example—had still not done so at the end of the period. There was one case, too, of an efficient borough lapsing into inefficiency, namely, Sheffield. The background to the difficulty was the increase of population revealed by the census of 1861. In 1851, there had been, roughly, one constable to every 700 of the population; now there was barely one to 1,000. Following Woodford's inspection in 1862, the Watch Committee proposed an increase from 191 to 257; but in 1863 he found the proposal only partly implemented. The strength at that time was 216 and he stated that he would be satisfied with 241; meanwhile, Sheffield lost its grant for 1862–63. In the year 1863–64, the force was increased to 231, but Woodford was still not satisfied, and it was not until 1864–65 that the grant was restored.[57] Three large boroughs announced in 1856–57 that they would not accept a grant from the Government. This was an empty gesture on the part of

[56] Ashton-under-Lyne, Macclesfield, Oldham and Stockport.
[57] PRO HO 45 OS 7614.

Gateshead, which on inspection failed to qualify for one in any case. But Sunderland and Southampton stuck to their principles even after being found eligible for grant.[58]

Among the medium boroughs, the proportion of inefficient authorities was higher. In this group, a new type of police authority is met —the consolidated borough, *i.e.*, one which did not exercise its police powers, but had an agreement with the county whereby the latter provided its police. Since from 1858 inefficiency virtually disappeared from the county forces, and since there were no consolidated boroughs in the counties inefficient after that date, consolidated boroughs were during the period always efficient. More than half the medium boroughs were inefficient in 1856–57; but only fourteen remained so in 1869–70—16 per cent. Consolidated boroughs rose from eleven to twenty-one—more than 20 per cent. Among them were towns of some importance, such as Stafford and Gloucester. In at least one case—that of Kendal—much of the advantage of consolidation was gained without a formal agreement when the town council put its police under the command of the superintendent of the county force who was stationed in the town.[59] Doncaster, Louth and Hereford were the only boroughs in this group to fall away from the standard of efficiency after once reaching it.

In discussing the small boroughs, the concept of efficiency cannot be used. The 1856 Act excluded them from grant and, as the Home Office ruled in another context, where no grant was payable, " it would be immaterial whether the [Inspector's] report . . . were favourable or unfavourable." [60] Hence, the Inspectors' reports on small borough forces are often so vague that it is impossible to say whether they thought them efficient or not. In general, however, they thought them inefficient and incapable of achieving efficiency because of their size. They encouraged small boroughs to employ more men and improve their discipline; but their comparative lack of success showed that inspection without grant achieved little. In their dealings with the small boroughs, the Inspectors' main endeavour was to persuade them to consolidate with the counties.

It has been shown that by 1870 there was no inefficient county force. The reduction of inefficiency in the boroughs, though less marked than in the counties, was still significant: from sixty-three in 1857 to eighteen in 1870. As with the counties, so with the boroughs, the Home Office could only maintain minimum standards. There were

[58] *Ibid.* 65/5; letter to the Treasury, Dec. 14, 1857; among the medium boroughs, Doncaster took a similar line; see Hart, *loc. cit.*, *Public Administration*, 412 and note.

[59] Parliamentary Papers, 1867–68, xxxvi, 84; 1868–69, xxxi, 86.

[60] PRO HO 65/3; letter to Cartwright, Sept. 29, 1860.

cases where the certificate of efficiency was issued only after hesitation and delay. Where lack of numbers was the cause of inefficiency, there was a risk that withdrawal of the grant might make things worse instead of better. For example, Woodford required an increase at South Shields following the 1861 census; by way of retort, the Town Clerk wrote " suggesting that a withdrawal of the Government allowance may be followed by a reduction of the present force." [61] There is no clear case of a county reacting in this way, but the possibility existed there also.

There is ample evidence of the influence of the Inspectors in rendering forces efficient. Margate, for example, had too few men to qualify for grant in the first year of the Act's operation. But in September 1858 the force was increased from six to ten, got its certificate, and kept it during the remainder of the period. Not less important was the role of the Inspectors in maintaining efficiency once achieved. For instance, when Woodford inspected the Tynemouth force in 1862 he suggested an increase as a result of the population increase shown by the census of the previous year. " This suggestion," he reported " (like all others tendered to the authorities of this borough having any tendency to add to the efficiency of their police force), was acted upon without loss of time, and . . . a few days later an augmentation of the force was ordered " from thirty to thirty-three men.[62] Ready co-operation on the part of local authorities with the Inspectors was the norm. All the more striking by contrast was the behaviour of the group of boroughs next to be considered.

There were forty chronically inefficient boroughs, *i.e.*, boroughs which failed to qualify for grant during three or more successive years. Even among these, however, the trend was towards improvement; only nineteen remained inefficient in 1870. Had they anything in common besides their inefficiency? It is worth inquiring, whilst recognising that there were also features peculiar to each. Thus, at Oxford, the city and the university each had a force. The former was on duty by day and the latter by night. It finally required a private Act to remove this anomaly, and the reorganised force first qualified for grant in 1868–69.[63]

Firstly, the chronically inefficient boroughs were very unevenly distributed geographically. Twelve were in the industrial region of Lancashire, Cheshire and north-west Derbyshire, and eight in the three western counties of Somerset, Devon and Cornwall. Moreover, inefficiency was slower to disappear from those regions than elsewhere.

61 *Ibid.* letter to Woodford, Sept. 7, 1861; the threat was not carried into effect.
62 Parliamentary Papers, 1860, lvii, 621; 1862, xlv, 494–495.
63 *Ibid.*; 1867, xxxvi, 452–453; 1867–68, xxxvi, 39; 1869–69, xxxi, 38; 1870, xxxvi, 309.

Of the nineteen boroughs which remained inefficient in 1870 thirteen were in these two regions.

Secondly, there were two distinct types of inefficiency, corresponding largely to the regions indicated. In the north-west an increase in strength was in almost all cases the one thing wanting to make forces efficient. Congleton, which refused even to provide uniforms for its police until 1890,[64] was an exception; but Woodford's comment on the Bolton force was typical of the chronically inefficient boroughs of the region:

> The Inspector had every reason to be satisfied with the state and general appearance of this police force, but . . . it is far from being sufficient in number.[65]

Forces elsewhere, on the other hand, and particularly in the south-west tended to be inefficient generally. Bridgwater, with a superintendent and four constables for a population over 10,000, was typical:

> The superintendent is the only officer who takes day duty, and he is infirm and appears incapable of much exertion. The constables perform night duty; and, with the exception of being seen when going on duty at 9 o'clock in the evening, and when coming off duty at 6 o'clock in the morning, there appears to be scarcely any supervision.[66]

Moreover, at a time when the national trend was towards improved police, standards in some boroughs of the south-west were falling. Bideford, with a population near 6,000, cut its "force" from two constables to one and Falmouth from four to three. Willis commented on the latter:

> the police force in this borough has never been efficiently organised or sufficient in number, and it is now in a more inefficient state than formerly.[67]

Fully to account for the chronically inefficient boroughs it would be necessary to investigate local factors in a manner which is beyond the scope of this paper. It is, however, clear that, while inefficiency remained in 1870 common among the borough forces of two regions of the country, it ceased during the period to be a national problem.

Since one region of chronic inefficiency fell within Woodford's district, and the other within Willis's, it is necessary to consider whether the localisation of efficiency resulted from differing standards of the Inspectors. Although that possibility cannot be

[64] R. W. James, *To the Best of Our Skill and Knowledge: a short history of the Cheshire Constabulary, 1857–1957* (n.d., 1957?), 115.
[65] *Parliamentary Papers*, 1857–58, xlvii, 711.
[66] *Ibid.* 762.
[67] *Ibid.* 1871, xxviii, 483.

entirely eliminated, it can scarcely be the whole explanation. If Woodford's standards had been defective, Elgee would surely have revised his verdicts wholesale when he took over; no such revision took place. Moreover, both Woodford and Willis found shortcomings similar to those of the chronically inefficient boroughs widespread throughout their districts at the beginning of the period. In most cases they were able to remove them. Examples have already been given in which Woodford persuaded boroughs to increase the strength of their forces. Willis was similarly successful in persuading boroughs to reorganise their police. Dorchester, for instance, had only " several old and inefficient constables, who were not clothed or organised as a regular police force." But after Willis's second inspection a force was established and provided with uniform, and the " duties . . . arranged in a systematic manner, with supervision by day and night." Moreover, the cells were improved and fitted with W.C.s and heating, and the books were well kept.[68] The force regularly qualified for grant during the rest of the period. Thus, the survival of chronic inefficiency in two regions was not merely a result of differing standards among the Inspectors. They tried to enforce the same standards throughout their districts. The problem remains, why did they enjoy much less success in the two regions indicated than in their districts as a whole?

After proving themselves for years resistant to the blandishments of Inspectors and the seductions of the grant, places like Blackburn, Beverley, Louth and Stalybridge at last yielded, brought their forces up to standard and kept them there. Were there general factors at work favouring such transformations? Was there, in the first place, a connection between the volume of crime and the state of the police in these communities? In some cases, it seems, there was. For example, in reporting Barnstaple's force, with five men to a population over 11,000, inefficient, Willis drew attention to several undetected robberies which had occurred in the town. Not long after, the force was increased from five to ten and put under the command of a new superintendent transferred from the Metropolitan Police.[69] It is, however, difficult to show any general connection even when the statistics of crime can be taken as reliable.[70] In the case of inefficient boroughs, however, no such assumption can be made. The statistics were compiled from police returns and one of the commonest shortcomings of the early police was a failure to keep accurate crime records. Many small boroughs made no returns at all—Neath for example, prior to 1864–65. Others, including some which were not

[68] *Ibid.* 1859, Sess. I, xxii, 491; 1860, lvii, 614.
[69] *Ibid.* 1861, lii, 735; 1863, I, 275.
[70] For the difficulties of trying to relate police development to trends in crime, see, *e.g.*, Hart, *loc. cit.*, *English Historical Review*; Jones, *op. cit.*, 116–121.

inefficient in other respects, made incomplete returns—for instance, Southampton had been in the practice of including only detected offences in its returns.[71]

The Inspectors were, of course, well aware of all this, habitually prefaced their remarks on crime with some such observation as "according to the returns," and were usually careful to speak of "offences reported" rather than "offences committed." Often they added notes to query or explain the returns. When those from Northampton showed only thirty-one indictable offences, Cartwright glossed that they could "hardly be taken as correct." [72] When Barnstaple reported a significantly larger number of offences than the previous year, Willis pointed out that the "increase . . . is more apparent than real and attributable to a considerable extent to the increased attention of the police in making records." [73]

Sometimes, too, they supplemented the statistics with a qualitative statement of the volume of crime in a particular area. The proportion of constables to population in Exeter, for example, was well below the average for a large city; "as, however, crime is light" the force was efficient nevertheless.[74] There had been serious murders in Breconshire and Wiltshire; but they did not detract from the efficiency of those forces, since crime was "generally light." [75] Similar comments occur in the reports on chronically inefficient boroughs. In Penzance crime was "light considering the population." In Tiverton crime was "generally light." In Congleton, "generally speaking, crime and offences were all of a minor character." [76] Thus, while there is little significance in the fact that the returns from chronically inefficient boroughs do not show crime there to have been above the average, it is noteworthy that there is some evidence pointing the other way. The most obvious connection between crime and the state of the police is that crime might be expected to flourish where the police were inefficient. But it is equally likely that inefficient police would be tolerated longest where there was least crime. This last statement seems to have been generally true of the chronically inefficient boroughs, and so far as the admittedly inconclusive evidence goes, the prevalence of crime does not seem to have been a general factor making for police improvement in such towns.

The second question that is worth considering is whether there was any general connection between public order and the state of the

[71] Parliamentary Papers, 1868–69, xxxi, 136.
[72] *Ibid.* 1860, lvii, 551.
[73] *Ibid.* 1863, 1, 275.
[74] *Ibid.* 1860, lvii, 612.
[75] *Ibid.* 1861, lii, 768, 770.
[76] *Ibid.* 1867, xxxvi, 535, 542; James, *op cit.* 117.

police in the chronically inefficient boroughs.[77] Had they been quiet country towns, undisturbed by industrial and political unrest, they might well have been content with small, ill-organised forces. But clearly many of the boroughs in this group were not such communities. Lancashire and Cheshire, in particular, had been among the most disturbed areas of the country throughout the first half of the nineteenth century, and were also characterised by weak police forces. For example, of thirteen main centres of Chartism in the two counties eight were also chronically inefficient boroughs.[78] The area was also the centre of the Plug Plot riots of 1842.[79] Chronically inefficient boroughs elsewhere had known similar periods of unrest. There had been Chartist rioting at Dewsbury during the winter of 1839–40, while it had been necessary to summon the military to put down bread riots at Tiverton in 1847.[80] There was clearly no natural law by which outbreaks of public disorder led inevitably to the establishment of efficient police forces.

Nevertheless, there seems to have come a point in several of these towns when a riot led the authorities to conclude that an efficient police force was a lesser evil than periodical anarchy. Thus in 1861 Beverley was "more than once . . . in a state of anarchy, and . . . on October 16 . . . so seriously was the peace of the town threatened, the mayor found himself compelled to call upon the Chief Constable of the . . . East Riding of Yorkshire to afford him the means of preserving order." The following year the borough implemented the 1835 Act, qualified for grant,[81] and kept it during the rest of the period. At Stalybridge there were serious bread riots in 1863. Contingents of police from Cheshire and Lancashire were called in, as well as military aid. Eighty-three people were charged with rioting. Later in the year, the force was increased from thirteen to twenty-five men, was certified efficient for the first time,[82] and during the rest of the period remained so. A riot at Oxford towards the end of 1867 was followed by the promotion of the private Act to amalgamate the forces of the city and the university, and the new force was recognised as efficient in the year 1868–69.[83] *Post hoc*, of course, is not *propter hoc*; but the number of examples suggests that there may well have been some connection, and this would be a fruitful line for further inquiry.

77 The possibility of such a connection is one of the questions considered in an important recent book, F. C. Mather, *Public Order in the Age of the Chartists* (1959).
78 A. Briggs, ed., *Chartist Studies* (1959), 52n.
79 A. G. Rose, "The Plug Riots of 1842 in Lancashire and Cheshire" in *Transactions of the Lancashire and Cheshire Antiquarian Society*, lxvii (1958).
80 Hutchings, *op. cit.*, 153.
81 Parliamentary Papers, 1862, xlv, 482, 495: 1863, I, 240, 252.
82 James, *op. cit.*, 122–123; Parliamentary Papers, 1864, xlviii, 676.
83 Parliamentary Papers, 1867–68, xxxvi, 39; 1868–69, xxxi, 6; 1870, xxxvi, 349.

Besides the increasing efficiency of independent forces, the other main trend during the period was the consolidation of borough forces with those of the counties. Existing accounts tend to underrate the importance of this process [84] which started before the beginning of the period. In 1856–67, thirty-six borough forces were consolidated; by 1869–70, the number had risen to fifty-eight, an increase from 17 per cent. to 26 per cent. of all boroughs possessing police powers at the dates mentioned.[85] Moreover, consolidation agreements were more permanent after 1856. Before that date, a number of boroughs had terminated the agreements they had made with counties, and established, or re-established, independent forces.[86] During the period discussed here, there were only two such cases, both in 1856–67.[87] This greater permanence was almost certainly the result of the provision in the Act of 1856 that consolidation agreements could only be terminated by permission of the Secretary of State.[88] This power was in fact used very leniently.[89] But it discouraged boroughs, such as Rochdale,[90] from entering into such arrangements unless they were quite convinced of their desirability, and probably discouraged them from seeking to end agreements.

The great advantage of consolidation was economy. The cost of policing Devizes fell from £259 to £150 a year on consolidation with Wiltshire, whose Chief Constable declared that if Salisbury, the last independent borough in the county, followed the example of the others, it would be possible to cut its force from eleven to six men.[91] When a similar step was under discussion at Kidderminster, the Inspector reported that the force could be reduced from sixteen to thirteen, because the borough would have " the assistance of the county force for support." [92] Had Stamford merged its police with that of the county in 1857, there would have been a saving of £93 a year.[93]

[84] *e.g.*, J. M. Hart, *The British Police* (1951), 32; J. Coatman, *Police* (1959), 10, 32, 36.
[85] Of the 15 boroughs incorporated, 1856–70, nine remained consolidated in 1870.
[86] *e.g.*, Bridgnorth, Lichfield and Stafford.
[87] Carlisle and Godalming.
[88] 19 & 20 Vict. c. 69, s. 20.
[89] *e.g.*, in the case of Godalming; see PRO HO 45 OS 6266A.
[90] In 1857 the Watch Committee reported to the Council: " Some of your Committee perhaps might have been disposed to sanction a consolidation upon the question of economy in the maintenance of a force if the Council had the power of dissolving the agreement entered into with the justices on giving six months' notice, but they find that the 20th section of the Act passed last session provides that no such agreement shall be put an end to without the sanction of [the Home Secretary]. Your Committee consider that the reservation of such a power in such hands is at variance with the principles and rights of municipal corporations and therefore your Committee recommend the Council to establish a police force to be under the sole control of the Town Council through its Watch Committee." See S. Waller, *Cuffs and Handcuffs: the story of Rochdale Police through the years, 1252–1957* (1957), 24.
[91] Parliamentary Papers, 1852–53 (603), 1st Report of the Select Committee on Police, 143–145.
[92] Parliamentary Papers, 1865, xlv, 456.
[93] *Lincolnshire Constabulary, 1857–1957* (1957), 34.

Even partial amalgamation, such as existed in Kendal,[94] produced saving; the borough paid the county superintendent stationed in the town £50 to run its force. Boroughs of comparable size normally paid their chief officers twice as much, or more.[95]

The boroughs mentioned have one thing in common; in population they were over 5,000. For very small boroughs, there was an even more economical course than consolidation, namely to ignore the 1835 Act and have virtually no police force at all. Even at the end of the period, six boroughs employed only one officer each, the largest being St. Ives, with over 7,000 population.[96] Pwllheli was such a borough; its single constable was paid £40 a year, rising to £52 10s., plus fees to which he had no legal claim. The only other police expenses were uniform and the occasional employment of special constables. The borough's police expenditure can hardly have averaged more than £60 a year from 1857 to 1879, when at last its " force " merged with that of the county. From that date, three men were stationed in the borough, and even allowing for grant, there must have been some increase in the cost.[97]

Why did not more boroughs consolidate? No doubt some weight should be allowed to local pride, but more tangible factors occupy a larger place in contemporary records. Some boroughs seem quite genuinely to have needed less police than the county would have provided. In Pwllheli, with its one constable, there was not much crime and no serious disorder throughout the period.[98] In Southwold, another borough with a single policeman, there was " very little crime." [99] Indeed, it is noteworthy that the Inspectors were rarely able, in their strictures on small inefficient authorities, to produce evidence of an abnormal volume of crime.[1] They sometimes suggested in general terms that such boroughs were the haunts of criminals; but if the allegation was justified, the criminals seem to have operated sufficiently far from base to avoid annoying the borough authorities. Inhabitants of boroughs might feel dissatisfied with the amount of service they got from the county; the Chief Constable of Somerset, for example, reported that " complaints have been made by the Wells people that the men of the city are unduly used in the county." [2] A consolidated borough might qualify for grant, yet risk not getting it because a negligent Chief Constable failed to claim on its behalf.

94 See, *e.g.*, Parliamentary Papers, 1868–69, xxxi, 84.
95 *e.g.*, Louth, where the Head Constable received £135; Parliamentary Papers, 1868–69, xxxi, 31.
96 Helston, Launceston, Pwllheli, Sandwich, Southwold and St. Ives.
97 Jones, *op. cit.*, 153, 161.
98 *Ibid.* 156.
99 Parliamentary Papers, 1871, xxviii, 388.
1 Inspectors' Reports, 1856–70, *passim.*
2 *Somerset Constabulary Centenary, 1856–1956* (n.d., 1956?), 19.

Dartmouth twice came near to suffering in this way.[3] There was also the problem of what to do with the existing members of the borough force. Often they could be transferred, but sometimes the county was not agreeable; the consolidation of Bridgnorth, for example, was delayed six months until the council found other work for a man the county would not take.[4] Such objections were often based on the advanced age of the men concerned. Take the case of Buckingham, which had in 1870 a superannuation fund of £72 with an income of £31, and expenditure of £25, a year; moreover,

> the sergeant, who has served above thirty years, and is upwards of sixty years of age, must shortly be superannuated, and his allowance will soon exhaust the fund.[5]

Clearly had the borough wished to hand over at that time, the county would have good reason to hesitate before assuming such liabilities.

Consolidation sometimes became an issue in local politics. At Berwick-on-Tweed, the council gave up a plan to hand over their force to the county in the face of public opposition. At Stratford-on-Avon, the anti-consolidation party gained a majority at a local election and refused to implement an agreement to consolidate with the county.[6] Town councils were, more often than not, dominated by Liberals, and county benches by Conservatives; the former felt that the administration of boroughs, having been reformed, was popular and representative, whereas that of the counties was oligarchic and out of tune with the age. Such feelings were especially strong in the industrial towns of the north, where in addition there might be a specified local background of bad relations between county and borough authorities; such was the case, for instance, in Bolton and Rochdale.[7] Was it to be expected that such towns, newly incorporated as they often were, should give up their police powers in favour of the county from whose jurisdiction they had just emerged?

Closely related was the widespread preference for the borough pattern of police administration, with the principal role allotted to the Watch Committee, rather than to the Chief Constable as in the counties. Arguing against an unsuccessful proposal to merge the High Wycombe force with that of Buckinghamshire in 1863, one of the councillors spoke of

> the despotic use of power by the Chief Constable of Buckinghamshire who said in the case of a superintendent at Slough when addressing the magistrates, " I have power to dismiss any member

[3] PRO HO 65/6; letter to Treasury, Feb. 14, 1859; to Willis, June 3, 1865; and to Dartmouth, June 13, 1865.
[4] Parliamentary Papers, 1852–53 (603), 1st Report of the Select Committee on Police. 152–153.
[5] Parliamentary Papers, 1871, xxviii, 355.
[6] PRO HO 45 OS 7746.
[7] Mather, *op. cit.*, 72–73; Waller, *op. cit.*, 21.

> of the force without giving any reason whatsoever," and when they referred to the Act they found it was so. It was un-English and unjust.

Put in this way, his dislike of the Chief Constable's powers smacks of constitutional principle. But the alternative pattern of administration by Watch Committees was often squalid in reality. A large borough like Manchester might allow its chief officer similar discretion to that enjoyed by a county Chief Constable.[8] More usually, however, borough chief officers were subject to constant interference in their work. In particular, brewers who sat on the council, and sometimes on the Watch Committee itself, would intervene to protect licensed houses in which they had an interest from prosecution. Even where they did not actually do so, the fear that they might, inhibited the police in the execution of their duty. Such was the state of affairs at, for example, Liverpool, Cambridge and Carlisle. At Norwich, the influence of the brewers on the Watch Committee was such that the Chief Constable was under instructions not to prosecute any publican without the approval of the Committee. When he defied the rule he was dismissed. The clearest case of opposition to consolidation from brewers occurred at Romsey, which was

> a sort of Alsatia . . . beerhouses . . . are kept open . . . for nights and nights together. . . . Attempts have been made . . . to consolidate the two forces [*i.e.*, those of Romsey and Hampshire] but the corporation do not like to give up their petty privileges, and combine with the county force; besides which (I believe it is not the case in Romsey alone but in many boroughs) the brewers have great power . . . in preventing the amalgamation of the forces.[9]

Just as brewers and publicans had reason to prefer the borough to the county police, because the former would be more susceptible to their influence, so would the tradesmen of a town prefer to have their weights and measures inspected by the police of the borough rather than by those of the county. In 1870, for example, the Chairman of Caernarvonshire Quarter Sessions stated that

> there were no standard weights and measures in Pwllheli, that the town weights and measures had not been examined in the memory of anyone, and the present ones were all false throughout the town.[10]

The importance of patronage as one of the bonds of society in

8 Parliamentary Papers, 1852–53 (715), 22–23.

9 Parliamentary Papers, 1852–53 (603), 1st Report of the Select Committee on Police, 22, 34, 90, 98, 120, 124; (715) 2nd Report, 30.

10 Jones, *op. cit.*, 122; in the 19th century, inspection of weights and measures was one of the additional duties most commonly performed by the police.

nineteenth-century Britain is generally recognised. The reluctance of boroughs to surrender their patronage over the police was, therefore, natural. It delayed consolidation at Saffron Walden, and frustrated it at Bridgnorth. Indeed, Woodford, speaking as Chief Constable of Lancashire before he became an Inspector of Constabulary, thought it the greatest obstacle to consolidation.[11]

At first sight, the advantages of consolidation seem so great, that it seems surprising that any but the largest boroughs remained independent. On closer examination, however, so intricate a network of interests is found tied up with the maintenance of small, and often inefficient, borough forces, that it seems surprising, rather, that any voluntary mergers ever took place. Nevertheless, fifty-eight of the 223 boroughs possessing police powers in 1870 had given up their police powers of their own accord. Many of the remainder, such as Newcastle-upon-Tyne, Leeds and Bristol, were clearly large enough to stand on their own feet. How many of those remaining independent were too small for the effective exercise of police powers?

It is a question worth considering in some detail, since it is generally recognised that an excessive number of small forces has been one of the main defects of the British police system.[12] What was a "small force" during the period under discussion? Since the 1856 Act provided for the payment of grant to any borough whose population exceeded 5,000, the Inspectors had to assess the efficiency of some very small forces indeed. The figure, 5,000, was decided by Parliamentary considerations rather than on any profound principles of police science.[13] But the Inspectors had to consider, not only whether the forces of the smallest boroughs eligible for grant were large enough in relation to a population of 5–6,000, but also whether they were intrinsically large enough for efficiency. The traditional rule was, of course, one constable per parish. Yet, when Pwllheli's sole policeman told Cartwright that no crime had been reported during the year, the Inspector commented

> crime may be low, and the return may be correct; but in case of anything occurring, either robbery or fire, I do not see how any one man can be held responsible for being always available, particularly as he must occasionally close his eyes.[14]

No matter how small and law-abiding the community, one policeman

11 Parliamentary Papers, 1852–53 (603), 1st Report of the Select Committee on Police, 98; (715), 2nd Report, 36.

12 Coatman, *op. cit.*, 36.

13 The limit had been 20,000 in the 1854 Bill which was withdrawn mainly because of the opposition of the boroughs; *cf.* Hart, *loc. cit.*, *Public Administration*, 406 and note.

14 Parliamentary Papers, 1867, xxxvi, 473.

was not enough, seven centuries of tradition notwithstanding. Nor were two, such as Godalming had; for

> it is scarcely possible in such small forces to ascertain whether the duties are properly performed or not, as the senior constable, who generally takes the day duty, must leave it very much to the trustworthiness of the second constable for the due performance of the night duty.[15]

If there were three—two constables, and one sergeant—the constables would be only partly supervised, because the sergeant could not be on duty all round the clock. A force of four would provide for supervision of the constables twenty-four hours a day, but leave no one free to escort prisoners or attend court. Five, then, was the bare minimum for efficiency for any borough, but six was better, for, as Cartwright remarked when Grantham cut its force from six to five,

> this small force . . . is sufficient for the small area it has to cover, but the reduction of one constable will tell in case of sickness or a change of men.[16]

It was very unusual for a force with less than six men to qualify for grant. That was the minimum size both for reasons of internal organisation and discipline and in relation to the population of the smallest boroughs which were eligible for grant.

Of course, the idea of a police force of six men seems absurd today. It was not necessarily equally absurd in 1870. The two main factors have become much more important since that time. Modern police work depends on the use of much equipment (*e.g.*, radio patrol cars) and specialised skill (*e.g.*, that of the detective officer). Large forces can provide such equipment and skill more economically and employ it more fully than small ones. Secondly, if every community which could afford six policemen today were allowed to have an independent force, the number of such forces would be much greater than it was in 1870, and the problems of co-operation much more acute.

Prior to 1870, very little equipment and specialised skill was used in police work, and the large forces had by no means a monopoly of them. For example, one of the small Welsh counties, Caernarvonshire, appears to have been the first to provide a printing press for police use.[17] Nottingham—by no means the largest borough force—was a pioneer in the use of photography.[18] Borough forces of modest size, such as Cambridge, Walsall and Worcester, had detectives.[19]

15 *Ibid.* 567.
16 Parliamentary Papers, 1864, xlviii, 636.
17 Parliamentary Papers, 1861, lii, 682; 1862, xlv, 444, 475.
18 Parliamentary Papers, 1861, lii, 668.
19 Parliamentary Papers, 1860, lvii, 537; 1861, lii, 672, 1862, xlv, 474.

By way of comparison, it is worth pointing out that some county forces, such as Monmouthshire and Somerset, introduced photography and detectives only after the First World War.[20]

Was the number of small independent forces during the period too large for effective police co-operation? There were in 1870 fifty-nine counties and 223 boroughs with police powers, of which fifty-eight were consolidated and 165 had their own forces. Thus the average county had less than three boroughs with which to co-operate continuously. The proportion of less than three borough forces to each county force suggests that there was no serious problem of co-operation. But this is to over-simplify. Of the independent boroughs, 113 were efficient, twenty-one were inefficient, and thirty-one had fewer than 5,000 population. Both boroughs in general, and each class of borough, were very unevenly distributed. The distribution of inefficient boroughs has already been discussed. Small independent boroughs were mainly found in the south of England; there was only one in the nine northern counties.[21] There were few boroughs of any kind in Wales, and a high proportion of them had consolidated; in 1870, there were only 8 Welsh borough forces. Consolidated boroughs were mainly found in Wales, the Midlands, and some southern counties; Wiltshire, for example, had four as opposed to one which remained independent. By 1870, problems of co-operation arising solely from the number of small forces were confined to a few counties, such as Cornwall, Devon and Kent.[22]

Thus, in 1870 the number of small independent forces did not constitute a national problem, and was declining through consolidation. The twentieth-century problem is not mainly the result of medieval survivals but of the continuous creation of new borough forces in the later decades of the nineteenth century. Where communities tried to obtain police powers by private Acts, the Home Office supported the efforts of the county authorities to thwart them—successfully in the case of Wallasey, for example.[23] But there seems to have been no case during the period of the Home Office opposing the grant of a borough charter on the grounds that the town in question would be better policed by the county. Most of the fifteen new boroughs remained consolidated with their counties during the period, but six established forces, of which three were inefficient in

20 *Exhibition of Records Illustrating the Growth of the Constabulary in Monmouthshire* [20], *Somerset Constabulary Centenary*, 32.

21 Richmond, Yorkshire.

22 Cornwall had eight independent borough forces, four of them inefficient, and the remainder in places with less than 5,000 population; Devon had nine independent borough forces, including two inefficient, and three in places with less than 5,000 population; Kent had 14 independent borough forces, three of which were in places with less than 5,000 population.

23 PRO HO 45 OS 7207: Tranmere seems to have been a similar case; *cf. ibid.* 7364.

1870—two chronically so.[24] An Act of 1877 precluded the conferment of police powers on new boroughs with less than 20,000 population.[25] This was in line with the exclusion of a number of small boroughs—*e.g.*, Brackley and Appleby—from the provisions of the 1835 Act, and the supersession of the police powers of all boroughs with less than 10,000 population by the Local Government Act of 1888.[26] But still new forces continued to come into being—five in 1887 in Lancashire alone[27]—and so the total number of borough forces remained high until well within the present century.

IV

The administration of the 1856 Act was remarkably successful. Inspection and grants ensured that the aims of the Act were realised at almost all points within a short period of years. The process was smoothest in the case of the counties. The boroughs presented greater difficulties, but by the end of the period, chronic inefficiency was a regional rather than a national problem. The greatest failure was the continued survival of a number of small borough forces not consolidated with the counties. The practical difficulties they caused were, however, localised. It was the grant of police powers to newly incorporated boroughs that created the twentieth-century problem of small borough forces, rather than the survival of ancient independent corporations. Here the border between administration and policy was reached. The Inspectors showed themselves to be good administrators; and it was from them rather than anyone within the Home Office itself, from the Secretary of State downwards, that the impetus for improvement came. But they did not prove effective advocates of new policies. To check the proliferation of new forces would have required a change of policy, which was not forthcoming until after 1870.

24 Dewsbury and Glossop.
25 40 & 41 Vict. c. 69, s. 8.
26 50 & 51 Vict. c. 41.
27 *Lancs Constabulary Journal*, Oct. 1958, 4.

LONDON GOVERNMENT AND ITS REFORM

J. F. Garner

The Royal Commission on Local Government in Greater London presided over by Sir Edwin Herbert and set up in 1957 has, with commendable expedition, published its Report [1]; is this Report, like that of the Ullswater Commission, " merely to be filed and result only in the establishment of a new Advisory Committee "? [2] It is sincerely to be hoped not—in the present atmosphere of reform in local government generally it is perhaps not probable—but it does not follow that all the recommendations of the Commission will or ought to be accepted. It is the purpose of this article first to examine the problems in London government thrown into relief by the Report, secondly to consider the recommendations and to attempt an appraisal of their validity, and thirdly to consider the extent to which observations made in the Report may be accepted as being of value or of general application in the context of local government reform outside London.

A. The Problems

The first problem is clearly that of size and complexity. At the end of the fifteenth century William Dunbar could describe London as " the flower of cities all, Gemme of all joy, jasper of jocunditie," but three hundred years later William Cobbett was already asking the modern question, " What is to be the fate of the great Wen of all, the Monster called ' the metropolis of the empire ' ? " The Report points out that by 1959 the estimated population of the areas included

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1 Cmnd. Paper 1164, published October 1960.

2 The " Ullswater Report "—the Report of the Royal Commission on the Local Government of Greater London—was issued in 1923. The main development (although this was not an express recommendation of their Report) was the establishment of the London and Home Counties Traffic Advisory Committee, under the London Traffic Act, 1924. " This Committee is not an authority with executive powers. It is a means, and a very cumbrous means, of trying in the interests of traffic to reconcile the differences or conflicts of interest between the various interests and classes of road users concerned. In consequence their work has been slow and tortuous in spite of the devotion of its members and the energy and ingenuity of its Chairman ": Herbert Report, para. 406. There is a distinct danger that a latter-day " solution " of London problems may be sought on the same pattern, by the establishment of a regional planning board with a " general oversight " but not executive powers. This would, we are convinced, be futile and possibly disastrous for the future well-being of London.

in the Review[3] was nearly nine million, or about one-sixth of the population of the United Kingdom; within that area there are three county boroughs, twenty-eight metropolitan boroughs and the City, forty-two non-county boroughs, twenty-eight urban districts, and the whole or parts of three rural districts, and there are also a great number of specialised or *ad hoc* authorities administering one or more functions of a kind that are elsewhere treated as being part of local government, such as the Metropolitan Water Board and the Commissioners of Police. Moreover, a number of these *ad hoc* authorities have their own particular boundaries which do not agree with that of the Review Area—"Greater London"[4]—or indeed with one another.

The City of London is a problem in itself; as the Report of the Royal Commission says,[5] "logic has its limits and the position of the City lies outside them." The Lord Mayor, of whom Dunbar said, "Thy famous Maire, by princely governance with sword of justice thee ruleth prudently," stands as high as ever in the esteem of Londoners and Englishmen from any part of the country, and although the City has a resident population of less than 5,000, no Government would wish to convert the City into a "rural borough," or even amalgamate it with the *parvenu*[6] City of Westminster. Closely related to the position of the City is that of the three county boroughs within the Greater London Area[7]; fortunately—at least from the point of view of reformers (or iconoclasts?)—county borough status was given to East Ham in 1915 on the understanding that the Corporation would not oppose any subsequent proposal for absorption of East Ham by the L.C.C., and such an extension of boundary would also have involved West Ham, this county borough being situate between East Ham and the County of London.[8] Croydon, however, which became a county borough in 1888 under the Local Government Act of that year, now has a population of 249,000, and has a stronger claim to retain its existing status as an independent authority, although it is completely surrounded by "Greater London."

The creation of an enlarged County of London or any solution of

3 The Review Area did not exactly coincide with any existing administrative boundaries. In the terms of the Royal Warrant, it included the City, the Metropolitan Police District, and a few non-county boroughs, urban districts and one parish on the fringe, mostly to the north. The terms of the Commission were to recommend what changes (if any) in structure and distribution of functions (excluding police and water) would better secure "effective and convenient local government."

4 As defined in the Royal Warrant appointing the Commission; this area is to be modified to a small extent according to the recommendations of the Report.

5 Report, para. 935.

6 Westminster became a city by virtue of its Bishop created by Henry VII in 1540; this office lapsed, however, 10 years later, and the status of Westminster as a city was not confirmed until 1900.

7 *i.e.*, Croydon, West Ham and East Ham.

8 Report, para. 749.

the problem of London government which would take away substantial rateable value from the Home Counties of Middlesex, Hertfordshire,[9] Essex, Kent and Surrey, must have some effect—more or less serious—on the resources of the rural or extra-metropolitan parts of those counties that would be left after such a surgical operation. As is recognised in the Report, the whole of Middlesex is now urbanised —it is all "London"—and the carving off of any parts of this unnatural county would be illogical and mortal to its continued existence as a "viable" unit; the inescapable (as it seems to the present writer) result must be the obliteration of the County of Middlesex from the administrative map. Essex would probably not be imperilled by the lopping off of its metropolitan fringe, nor would Kent —nor indeed Hertfordshire—but Surrey would obviously be seriously affected. Possibly the solution of this difficulty would be a drastic revision of county boundaries—for the rump of the county of Surrey to be thrown, for example, into one of its neighbours such as one or both[10] of the two parts of Sussex. In any event, while such consequences of boundary revisions cannot and must not be ignored, it is submitted that considerations of finance or even the sentimental ties of county loyalties, confined in a modern context largely to cricket and regimental history, should not be allowed to decide major boundary questions. If other considerations of administrative economy and efficiency combine with unity of interest so as to project the boundary of Greater London into the counties on its periphery, the implementation of such a policy should not be hindered by a sentimental desire to preserve the *status quo* and safeguard vested interests. Essex, Kent and Hertfordshire should in such an eventuality be compensated by a realistic and fair adjustment of exchequer grants so as to make good the decrease of their resources as a result of their loss of area.

Other special problems of local government in London are related to particular services.[11] Refuse disposal is never a simple matter in a

[9] Only a comparatively small area of Hertfordshire could be affected. The Commission refused to consider the special claim of the Borough of Watford for County Borough status, being of the opinion that this should be considered by the Local Government Commission. (Report, para. 998.)

[10] It seems probable that the Local Government Commission will be obliged to consider the fusion of the two separate counties of East and West Sussex. Other boundaries in the south of England are far from ideal. Hampshire could probably afford to lose territory to the south coast county boroughs, especially if it absorbed parts of Surrey and/or Dorset. Problems of this kind make it difficult to consider London in isolation, and it did not make the task of the Royal Commission any easier to know that another body—the Local Government Commission—was already seised of boundary problems outside London.

[11] The picture is further complicated by those services, such as the Metropolitan Police, which are organised specially but which outside London would be the concern of local authorities. However, this was expressly excluded from the consideration of the Royal Commission.

modern urbanised society. Incineration of refuse is wasteful and may offend against modern smoke abatement legislation, whilst controlled tipping is in principle desirable, but it demands the availability of suitable open land, and may involve extensive and expensive haulage. At present each borough and urban district in London makes its own arrangements, and as a consequence (we are told in the Report [12]) refuse is carted from place to place in a haphazard and expensive manner.

Even more complicated is the system of highway administration—which is scarcely a system at all. One road running through several districts may become the concern of many different authorities; and the authority responsible for maintenance of the road surface are not necessarily responsible for traffic control (or " management," as the Report calls it [13]), for street cleansing or for lighting. " The present machinery is so confused that it is difficult even to put down on paper a description of what it is, let alone how it works " [14]; suffice it here to say that the only co-ordinating authority in existence is the Advisory Committee, with no executive powers.

In the administration of town and country planning there is no one body responsible for the conduct of continuous research and for the provision of information over the whole area to authorities whose responsibility it may be to take routine (or important) decisions on specific planning applications; functions are divided between the different classes of authority (county and metropolitan borough, or county and county district, councils) on no logical basis and consequently the unsatisfactory device of delegation (described in the Report as "papering over the cracks") has had to be widely employed. Delegation often leads to a legalistic approach as to the extent of a particular authority's functions, and in practice is often wasteful of administrative effort.

These are by no means all of the current problems in London government brought out in the Report, but these remarks were intended to give some indication of the extent of the total. Each local government service has its own difficulties in administration; indeed, as in local government outside London, we may be faced with a choice between *ad hoc* authorities for each service, each having boundaries drawn by the dictates of administrative efficiency,[15] and

12 Report, para. 642.
13 Report, para. 403.
14 Report, para. 407.
15 Some services, such as the police, fire brigades and ambulances, hitherto administered separately, could be organised as a unified service; so could (and probably should) the personal health, environmental hygiene, welfare and children's services. The optimum areas for these two amalgamated services would not necessarily coincide, and whilst the housing and parks services could probably be operated as a third unit, public cleansing would almost certainly have to be organised

local government units of the present pattern but all in excess of a fixed minimum population having boundaries drawn predominantly on geographical lines and without regard to their ability to perform any particular functions.

B. The Recommendations

What then should be done with this great City? Can it still be administered by over a hundred second or single-tier authorities and six county councils? Should the number be recast, or is the whole problem too vast and complex for local government, and should London be administered, Washington fashion, by a central government department responsible only to Parliament? Some of the evidence before the Royal Commission apparently favoured the latter course—or an alternative solution of an extensive use of *ad hoc* authorities. Neither of these, however, was adopted by the Commission (and their Report was unanimous). They took the more orthodox view of recommending drastic revision of the existing structure. Their recommendations may be summarised as follows:

(a) For "local government purposes"—*i.e.*, for the administration of all local government functions at present so administered—in the review area, as slightly revised,[16] there should be constituted a number of Greater London Boroughs and a Council for Greater London.

(b) The Greater London Boroughs should be the "primary units" of local government; they should be municipal boroughs (*not* metropolitan boroughs) in status and constitution, and they should be within the population range 100,000 to 250,000. The City of London, exceptionally, should be one of these Boroughs, with its present constitution unaltered.

(c) The Greater London Council would be the education and planning authority, although by statute (and not by a delegation scheme) certain parts of the administration of these services would be the responsibility of the Boroughs. The Council would also be the authority for traffic, main roads, refuse disposal (not collection) and the fire and ambulance services. Members of the Council would be elected on a Parliamentary Constituency basis, elections being held at the same time as the election of members of Borough Councils, on a three-yearly basis.

separately. Administration by a series of separate Area Boards—Street Lighting, Housing and Parks, Sewerage and Building Control, Education and Libraries, etc., might make for efficiency but such a scheme would completely destroy local government as we know it.

16 By the exclusion of certain districts on the periphery as defined in the terms of reference of the Commission.

The recommendations have now been public for some time, and few elected bodies in the Review Area seem to be satisfied with the proposals. This is perhaps scarcely surprising in view of the vested interests involved. No one in local government, be he elected representative or officer, is prepared to vote his own local authority into oblivion; that is, of course, one of the main reasons why it has always proved so difficult to achieve agreement on questions of local government reform. These proposals would mean the abolition of the Middlesex County Council, the virtual abolition of the London County Council [17] (for the Greater London Council will be scarcely recognisable even as a Phoenix rising from the ashes of the L.C.C.), the Essex, Surrey and Kent County Councils would lose substantial and valuable territory, and most of the existing London or suburban authorities would be merged with their neighbours to form the new Greater London Boroughs; the three county boroughs would, of course, lose their present status. The Report makes suggestions [18] as to how the Greater London Boroughs could conveniently be created geographically (it is suggested there might be fifty-two of them, including the City) but the Commission have put forward provisional recommendations only, making use exclusively [19] of existing boundaries. The Surrey County Council and the L.C.C. have put forward separate but basically similar counter-proposals which recognise the need to create a joint board for particular services—in other words, they wish to disturb the existing structure as little as possible, whilst having an *ad hoc* authority for some functions (such as planning and traffic management) which can be administered only over a large area; Middlesex County Council have agreed with Surrey's proposals in principle. These counter-proposals seem, however, but palliatives—they do not meet many of the criticisms of the existing system made in the Report, including the sense of frustration felt by the second-tier authorities at the lack of ability to take responsible decisions, engendered in particular in planning "delegation" and health and education "devolution." Moreover, the establishment of a Greater London Board, whilst keeping the County Councils of London and Middlesex in existence, would add further complications: for a two-tier system would be substituted one of three tiers or "tears." The Greater London Board would be manned—or at least influenced —predominantly by the County Council representatives, while what is needed is to give more effective functions to elected representatives

17 On this aspect alone, it is not surprising that the London Labour Party are opposed to the recommendation, as they would not be in nearly as strong a position politically in the Greater London Council as they have been for years in the L.C.C.

18 See Report, para. 233.

19 Subject to one exception only, in the case of the Metropolitan Borough of Wandsworth.

in the second-tier authorities in their own right—the boroughs, who are nearest to the man in the street.

Moreover, as was said in *The Times* recently, such a Board "if it were to realise its potentialities would become a powerful organ without direct responsibility to the electors. More probably it would be reduced to ineffectualness by reason of its members representing autonomous councils with incongruous interests." England does not like *ad hoc* authorities in local government; as with coalitions in central government, they are at best expedients designed to meet an emergency. Once the highway and sanitary commissioners of the last century had shown that cholera and squalor could be wiped out by proper sanitation and living conditions, independent local authorities with a wide range of functions were created.

Remoteness from the electorate is an obvious danger with any *ad hoc* or large authority. We must confess to some trepidation on this score with the Greater London Council of the Report. Elections for county councils are notorious in the lack of enthusiasm they arouse at present; members of county councils are too remote from their ratepayers and many of them have little sense of responsibility for the "electoral divisions" they represent. Perhaps at first, the public interest in elections for the Greater London Council would be greater —but those elected (on the basis of one member per Parliamentary constituency) would rapidly be in danger of losing any sense of local responsibility for their constituencies. We would suggest that the members of the Council could well be chosen by the Councils of the Greater London Boroughs, on a system similar to that at present governing the election of aldermen of a borough council.[20] Each Greater London Borough Council would be entitled to elect two persons from amongst its own members, as members of the Greater London Council; this system should ensure a considerable degree of exchange of information and co-ordination between the work of the Council and that of the respective boroughs. Subject to this elaboration we consider the recommendations of the Report are workmanlike and courageous and worthy of a trial. They would, the critics urge, cause a vast upheaval, in the abolition of two counties and some fifty second-tier authorities. Apart, however, from inefficient administration because of the present lack of co-ordination, it is doubtful whether the present extensive number of authorities, at the lower level having

20 The suggestion that the Greater London Council should "comprise elected representatives nominated by the local authorities," was considered by the Council of the Association of Municipal Corporations at a meeting on April 20, 1961, it being suggested in the course of the debate that "representatives from the boroughs should not be in rivalry with the representatives of the Greater London Council. They would need to be partners, not rivals." When the suggestion was put to the vote it was not accepted by the meeting, which consisted of representatives from boroughs all over the country.

comparatively little of importance to decide, are worth retaining. If a local government system is expensive of staff, buildings and other resources, at least care should be taken to ensure that it is democratic and effective; the present system in London is probably neither.

It has also been suggested by one critic [21] that the Royal Commission's proposals would create " great chasms " (in contrast with the existing " cracks " papered over by delegation), in bringing about fragmentation of the existing L.C.C. education service, and a break-up of the welfare and children's services. The present unitary administration of these services applies, of course, only to *part* of the Review Area (a feature which L.C.C. representatives tend to overlook), and there seems no reason why the council of a Greater London Borough should not have sufficient resources to attain the high standards of the L.C.C. in all the functions to be entrusted to them. Co-operation between equals should not be difficult to achieve; it causes friction [22] only where, as under delegation or devolution, the parties are unequal.

It is difficult to see how the problems of London could have been tackled differently, assuming that something must be done about the existing chaos of authorities, chaos of functions and chaos of opinions. Ontario undertook a similar root-and-branch reform of the government of the largest city in the Province—Toronto—in 1953.[23] There much the same basic problem existed; a large central area, the City of Toronto of 650,000 or so population, surrounded by thirteen separate municipalities of differing size. The City itself was governed on the " county borough " pattern, whilst the suburban municipalities had a two-tier system of local government. The Ontario statute of 1953 introduced a " federal " system for the whole of the area—covering a population of well over a million—whereby a Municipal Federal Council was established, whilst the existing City and suburban municipalities were left intact. Health and welfare services, the supervision of court houses and gaols, water supply (but not distribution) and main sewerage were transferred from the municipal authorities to the Federal Council, and *ad hoc* authorities were established for the whole area for education, " transportation," police and town planning. The members of the Federal Council were representatives (those having secured the largest number of votes at the latest elections, for the most part [24]) of the City and suburban municipalities.

21 Mr. I. J. Hayward, Leader of the L.C.C., writing in *The Times* on March 10, 1961.

22 Mr. Hayward (*supra*) suggests that " co-operation and friction can often be the obverse and reverse of the same coin."

23 The present writer is greatly indebted for information about Toronto to an article by Professor J. B. Milner in the *University of Pennsylvania Law Review*, Vol. 105, 1957, p. 570.

24 It is not suggested that this particular method of selection of representatives, depending solely on popularity and not necessarily reflecting administrative ability or—much more important—sufficient spare time, should be applied to London.

It may sound a little strange to English ears, to speak of " federalism " in local government, but it is natural enough in a North American context. Moreover, what is the English two- or three-tier system of local government, with its legalistic approach to the functions of the several types of local authorities and its reliance on the courts to straighten out tangles between authorities at different levels, but essentially a federal system? The Toronto reforms are sufficiently similar to what is now recommended by the Royal Commission, for them to be of interest in this country—and the Canadian system of local government is probably nearer to the English than is that in many other Commonwealth countries. It is encouraging also to know that in 1957—a bare four years after the introduction of the reforms—it could be said [25] of members of the Greater Toronto Federal Council, that " they had adopted the metropolitan concept and rarely voted on a basis of local interests."

The prevalence of *ad hoc* authorities in Toronto is of course common to North America; in education, in particular, many parts of the U.S. and of Canada have " school boards " similar to those existing in this country between 1870 and 1902. Police is another function that is often separately administered [26]; but in most cases there is a considerable body of interlocking membership between the several boards and the local authorities strictly so called, and even in England, the *ad hoc* authority idea has been followed for the police service in London.

The example of Toronto should, we would suggest, encourage administrators in this country to accept the recommendations of the Report. Clearly, any reforms are open to criticism, but these proposals are subject to less of substance than most. If the proposals cannot be implemented, it may be that the course of despair and failure—that of abandoning the problems as being beyond the capacity of local government to resolve—may have to be adopted, and London may have to submit to the bureaucratic control of a central department, and a minister responsible only to Parliament. In that event the domestic affairs of London would certainly receive slight attention.

C. Local Government Reform—Generally

It is now proposed to turn to another subject, namely the lessons to be learned for local government outside London from the observations

[25] See Milner, *op. cit.*, at p. 579.

[26] " Housing Commissions " also are very common; partly perhaps because state legislatures generally have not yet fully recognised the need for housing as a normal function of local government.

and recommendations made in the Report. These can be considered under three headings.

(a) *Delegation*

The device of delegation—whereby under an agreement entered into with statutory authority [27] one local government agency entrusts another with the performance of the whole or some part of one or more of its functions—has been widely resorted to in recent years, especially in the field of town and country planning. Because this function was vested in district councils and county borough councils under the Town and Country Planning Act, 1932, and no doubt also because it was recognised that detailed planning control was essentially a local function, county planning authorities generally [28] were empowered by section 34 of the Town and Country Planning Act, 1947, to delegate "Part III functions" (relating to the control of development) to district councils in the county (subject to the approval of the Minister). Most counties had entered into agreements giving some more or less limited measure of delegation to their county districts by 1959, when the principle was taken further by the Town and Country Planning (Delegation) Regulations, 1959,[29] which made delegation compulsory in favour of all county districts having a population of 60,000 or more; although these Regulations do not apply to the "metropolitan area," otherwise the Review Area.

Formal delegation of the personal health services—Part III of the National Health Service Act, 1946—is strictly not legally possible, as this is a service for which the county health authority are required by statute to appoint a committee, and no express power of delegation is conferred by the enabling statute.[30] However, many county health authorities, under pressure from the county district councils, many of whom had been "maternity and child welfare authorities" under the Public Health Act, 1936, worked out "devolution" schemes of "divisional administration," dividing their counties into areas wherein the

27 The need for express statutory authority is due to the operation of the doctrine *delegatus non potest delegare*, borrowed from private law. The delegating authority is treated as being already a delegate, having been entrusted with the duty of exercising the particular function by Parliament. The same principle has been applied in the United States to deny any right in Congress, to whom the legislative power is entrusted by the Constitution, to delegate to the President (the executive) any portion of the legislative power, an application of the theory that has made detailed government by the executive in times of emergency exceedingly difficult: see Corwin, *The Constitution and what it means Today*, 11th ed., at p. 122 *et seq.*

28 The device of delegation has no place, of course, in a county borough "all-purpose" authority. Delegation of planning operates in London in much the same manner as it does in the rest of the country.

29 S.I. 1959, No. 1915.

30 Therefore the general delegation power contained in s. 274 (1) of the Local Government Act, 1933, does not apply.

county health services were administered [31] by local committees. These committees usually consist partly of members of the county council and partly of members of the county district councils in the area, and they are usually constituted legally as sub-committees of the county council's health committee. Welfare services are legally in the same position and so is the children's service. Under section 46 of the Local Government Act, 1958, some measure of delegation was provided for, in that a county council was required as a matter of law to delegate its health and welfare functions to district councils in the county, having a population of 60,000 or more.[32] There is also a provision in the statute enabling a district council having a population less than 60,000 to apply to the Minister of Health for approval to the preparation of a delegation scheme, but in spite of a considerable number of applications under this provision, the Minister has approved delegation in such circumstances in very few cases and only then where the district council had a population closely approaching 60,000.

In education, the Act of 1944 had given to a county district council having in 1939 a population of 60,000 or more, or a school population of at least 7,000, the status of " excepted district," for secondary and primary education. In spite of the name, however, this does not mean complete freedom, as the county education authority can retain financial and policy control. This device has been extended by section 52 of the Local Government Act, 1958, to any county district which may at any subsequent time attain the magic population figure of 60,000.[33] In addition, county authorities may prepare schemes for " divisional administration," whereby the education service in a particular area is governed by a " divisional executive," subject to greater or less supervisory, financial, and other control at county level.

Delegation in one form or another is—and has been for several years—very common in the Greater London area, and the Royal Commission make several observations on the subject. First, it is pointed out that the device has introduced an element of flexibility, by permitting " the organisation of a number of major services to be adjusted to suit local conditions," but the device has also led to legalistic arguments, one of which, namely whether delegated powers once given could be withdrawn or exercised contemporaneously by

[31] Or rather " supervised," for many county health authorities gave their area health sub-committees the scantiest of powers; often they were little more than advisory bodies, having no staff of their own and no financial responsibility.

[32] The details of the scheme are subject to the Minister's approval; these provisions do not apply to the " metropolitan area," which is defined in the Fifth Schedule to the 1958 Act, and is virtually the Review Area (see L.G.A., 1958, s. 53). However, devolution was practised in the Review Area apart from the 1958 Act in much the same manner as outside London.

[33] The education provisions of the 1958 Act do not apply to the " metropolitan area," but the Act of 1944 did apply outside the administrative county.

both parties, has been disputed in Middlesex "with the ardour of mediaeval schoolmen." It is pointed out that delegation introduces "a sense of diminished responsibility, particularly in relation to the levying of a rate,"[34] and it is a scheme that involves "inevitable stresses and strains requiring exceptional people to withstand them. Moreover, delegation really only exists to paper over the cracks caused by the split of a function between an 'upper-tier' and a 'lower-tier' authority."[35] It could also have been pointed out that the lower-tier authority would usually prefer to be entrusted with a function even if in some measure limited—by Parliament, rather than to acquire such a function as an act of grace from, and subject to the general direction of, the county authority. Delegation is wasteful in time, energy and manpower[36]; in the field of town and country planning it often means that applications for planning permission are looked at twice, by two sets of officials, and sometimes by two committees as well. In all forms of delegation or devolution financial responsibility is rarely given to the "lower" tier authority,[37] with the consequence that their members acquire a sense of frustration at their lack of power to make effective decisions. This in itself leads to a feeling of inferiority on the part of the members of the district council, which is bad for local government morale generally,[38] as the counties and the districts should think of themselves as equal partners[39] in a joint enterprise.

The observations of the Royal Commission on this topic are all the more welcome, as they come at a time when some of those concerned with local government reorganisation seem to be of the opinion that delegation should be used even more widely. It is an unsatisfactory, expensive, and over-complicated device which should be employed as sparingly as practicable.

(b) *Urban parishes*

In paragraphs 737–739 of the Report it is shown that the Commission considered—and rejected—a proposal for the introduction of urban parishes in the Greater London Area. The proposal was

34 Report, paras. 258 and 259.

35 *Ibid.*, para. 264.

36 *Ibid.*, para. 768.

37 The writer is aware of a scheme of "administration" by district health sub-committees, where the members of the local sub-committees, entrusted with a general supervision of the district nursing service in the area, are allowed to expend a maximum of £5 only on the repair of a nurse's house without the prior approval of the county committee! The members of the sub-committees are representatives of district councils accustomed to taking executive decisions on far wider and more serious topics.

38 Report, para. 687.

39 The financial organisation of local government does not assist in the maintenance of this view, where it is customary for some two-thirds of a district council's rate to be required to meet the county council's precept.

rejected mainly, it seems, on the ground that " a body that can express views but has no responsibility for carrying them into effect suffers from two defects—on the one hand, such a body would tend to become irresponsible; on the other, the members would tend to become frustrated." Whilst accepting the force of this argument in the London context, we would not wish it to be thought that the idea of urban parishes generally had been shown to be unsound in all contexts.

It is suggested that there is a good case for legislation to provide for any borough (county or non-county) or urban district which takes in new territory formerly in a rural district on the occasion of a boundary extension to be enabled to provide for a parish council (or possibly a parish meeting) to be kept in being after the absorption of the parish in the borough or urban district. This power would go a long way towards disarming opposition among the inhabitants in such a parish, to a boundary extension by the borough or urban district. The idea could also be applied to enable a borough or urban district council to set up parish or ward committees for any area where they were satisfied there was an adequate community of interest. These could either be committees of the authority, consisting entirely of the councillors (and possibly a few co-opted members) for the " ward " concerned, or the legislation could provide that such a committee should have a separate status and powers similar to those enjoyed by rural parishes. A device of this kind would do much to overcome the sense of " remoteness " from the electorate only too evident in some elected representatives in the large cities. If effective powers are given to the " ward committees," they need become neither irresponsible nor frustrated. At the present time there is a greater interest taken in the affairs of the average parish council than there is in the affairs of any other class of local authority. Why cannot some of this sense of local feeling be brought into our great cities, most of whom have many quite well defined local areas; in one city at least such an area is still known as " the village " to local residents.

D. The Nature and Purpose of Local Government

This is one of the subheadings used in the Report,[40] and very interesting are the observations made thereunder. Emphasis has been put by the Commission in their deliberations on " administrative efficiency and the health of representative government as well as the organic relationship of both. By ' local government ' we mean local self-government." [41] The point is also made that the ideal size for administration is different for different services.[42] Whilst pointing out the

[40] Report, paras. 219–242.
[41] *Ibid.*, para. 222.
[42] *Ibid.*, para. 227 (3).

need for an authority to be of sufficient size for it to attract good professionals as officers, the Commission also emphasise the need to control the experts by effective councillors; "the balance may be thrown out if councillors have too little to do and also if they have too much." [43] Applying these same general principles to local government outside London—inside London, as we have seen, these principles led the Commission to the Greater London Boroughs—they must result, we would think, in a wider use of the county borough system of government where practicable and larger county districts in the more rural areas, entrusted by Parliament in their own right (and not by delegation) with a wider range of existing local government functions. As the Commission observe, "it is impossible to say that from the point of view of economy there is any optimum size of authority." [44] These are perhaps not surprising conclusions as they are fundamentally in agreement with the provisional recommendations so far made by the Local Government Commission under the Local Government Act, 1958. The predilection of Parliament towards taking services away from the Town Halls and giving them to the County Offices, which has been evident since 1945, must be reversed for the better health of local government in the true sense. The necessary revision of areas should be undertaken with this objective firmly in view.

Conclusions

Whatever may be the results of the Commission's Report—after the dust of the battle now joined has died down—Parliament will presumably do something.[45] Administration of the great Wen will surely not be allowed to continue unaltered. As we have attempted to indicate, it is doubtful whether the problem of London can be satisfactorily tackled piecemeal; it is part of the general problem of local government reorganisation throughout the country. What is done in London is bound to affect the Home Counties, and changes in their boundaries will in turn have an effect on the boundaries of neighbouring counties. Also the view taken by H.M. Government of the major recommendations in the Report—in the attitude adopted

[43] *Ibid.*, para. 237. In para. 233 it is pointed out that "The control of the expert by the amateur representing his fellow citizens is the key to the whole of our system of government." The "right" size for a local authority is therefore of vital importance, but that size cannot be defined dogmatically.

[44] Report, para. 283.

[45] It was said in the House of Commons by the Minister on March 14, 1961, that 108 out of the 111 local authorities whose districts were wholly or partially within the area reviewed by the Commission, had sent in their views to the Ministry. "While nearly all," it was said, "accept the need for some changes, views on the Commission's main recommendations range from complete acceptance to outright opposition." The Minister promised to make a statement as to the Government's intentions as soon as he had had an opportunity of studying these views.

towards delegation, and the extent to which functions are allowed to govern boundaries—will be some indication of the action that may be expected from the Minister of Housing and Local Government (and possibly from Parliament itself) when the final recommendations of the Local Government Commission meet them.

We would expect the main recommendations of the Report, in particular those relating to a Council for Greater London and the Greater London Boroughs, to be accepted. It is futile to expect agreement from all concerned, and Parliament must be prepared to dictate a peace to the wrangles and disputes. By and large, we think the Commission's proposals would achieve a substantial and worthwhile reform.

One minor observation in the Report we have not thought of sufficient importance to be worthy of earlier mention: apparently the Commission are not recommending the making of any changes in the public health law [46] as at present applicable in the administrative county of London. As is well known, this branch of law in London is substantially different in detail, if not in general principle, from the law in force outside London and we would have thought it desirable for this special "law of London" to be assimilated and the Public Health Act, 1936, applied to the whole Metropolis. Some attention will have to be paid to the question if the main recommendations of the Commission are adopted, and it would seem undesirable for the Public Health (London) Act to be extended to the whole of the Review Area, as would presumably be the case if no special provision is made when the Council for Greater London comes into being.

[46] The Commission expressly leave open the question of the special building law applicable to London as they were informed that the Minister of Housing and Local Government was reviewing the whole system of building control (see para. 888). The result of the Minister's review is now known and by the Public Health Bill at present before Parliament, building by-laws are to disappear and the Minister will make "building regulations" for the whole country. These will *not*, however, apply to London, where (presumably) the present system under the London Building Acts will continue. Will these in future apply to the whole of the area of the Council for Greater London?

CULTURAL AND EDUCATIONAL RIGHTS OF INDIAN MINORITIES AS JUDICIALLY INTERPRETED

SUBRATA ROY CHOWDHURY

THE National Anthem of India proclaims:

> "Day and night, thy voice goes out from land to land,
> calling Hindus, Buddhists, Sikhs and Jains round thy throne
> and Parsees, Mussalmans and Christians.
> Offerings are brought to thy shrine by the East and the West
> to be woven in a garland of love.
> Thou bringest the hearts of all peoples into the harmony of one life,
> Thou Dispenser of India's destiny,
> Victory, Victory, Victory to thee."

Quoting these words of Rabindranath Tagore the Supreme Court of India recently said: "It is thus that the genius of India has been able to find unity in diversity by assimilating the best of all creeds and cultures. Our Constitution accordingly recognises our sacred obligations to the minorities." [1]

In emphasising the duty of the court to uphold the fundamental rights granted by the Constitution to the minorities the Supreme Court further said [2]: "Throughout the ages endless inundations of men of diverse creeds, cultures and races—Aryans and non-Aryans, Dravidians and Chinese, Scythians, Huns, Pathans and Mughals—have come to this ancient land from distant regions and climes. India has welcomed them all. They have met and gathered, given and taken and got mingled, merged and lost in one body. India's tradition has thus been epitomised in the following noble lines:

> "None shall be turned away
> From the shore of this vast sea of humanity
> That is India" (Rabindranath Tagore).

India, with a population of 357 million, according to the 1951 census, is a multi-lingual and multi-religious country, having various minority communities—religious, cultural and linguistic. The majority of the Indians are by religion Hindus. But there are important religious minorities, such as, thirty-five million Mahomedans, eight million Christians, six million Sikhs, three million Jains, besides Buddhists and Parsees. There are about 111,000 Anglo-Indians who

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1 *All India Reporter* (1958) Supreme Court, pp. 956, 986.

2 *Ibid.*

constitute both a religious and a linguistic minority. In 1951, Scheduled Castes numbered fifty-one million and the Scheduled Tribes nineteen million.

Many different languages and dialects are spoken in India. Hindi is the official language of the Union of India: article 343 (1). The Union has a constitutional obligation to promote the spread of the Hindi language: article 351. Yet, for a period of fifteen years from the commencement of the Constitution, the English language shall continue to be used for all the official purposes of the Union: article 343 (2). Even after the said period of fifteen years, Parliament may by law provide for the use of the English language for such purposes as may be specified: article 343 (3). Until Parliament by law otherwise provides, the proceedings in the Supreme Court and in every High Court and all legislative enactments of Parliament or State Legislature shall be in the English language: article 348 (1). The State Legislature may prescribe another language for use in legislative enactments but in such event a translation of such enactments into the English language must be made and this translation is to be deemed the authoritative text in English for the purpose of article 348. The effect of article 346 is to make English the language for official communications between the Union and a State and between one State and another; but two or more States may agree to substitute Hindi for communications between one another.

In the scheme of our Constitution, the English language therefore occupies a position of predominant importance, with Hindi as a possible substitute for the future. But the makers of the Constitution have taken great pains to introduce special safeguards against the cultural oppression of linguistic minorities. In a multi-religious and multilingual country like India, it is a delicate, and indeed a very difficult task, to attempt an harmonious blending of the two different trends—the historical process of assimilation of the different cultures into one composite national culture and the preservation of the distinctive cultural aspirations of the different linguistic groups. Apart from the Union Territories, there are fifteen constituent States in India and almost in every State there are islands of linguistic minorities. Apart from Hindi and English, thirteen other languages have found recognition in the Eighth Schedule to the Constitution. They are: Assamese, Bengali, Gujarati, Kannada, Kashmiri, Malayalam, Marathi, Oriya, Punjabi, Sanskrit, Tamil, Telugu and Urdu.

The States in India were formed largely as a result of historical accidents and consequently people demanded reorganisation of the States on a more rational basis, taking into account the growing importance of regional languages and also financial, economic and administrative considerations. Accordingly the States Reorganisation

Commission was set up in December 1953, which submitted its report on September 30, 1955. The States Reorganisation Act of 1956 was passed by the Indian Parliament to give effect to the scheme of reorganisation recommended by the Commission. In terms of the statute several States were reorganised and their boundaries redrawn. The linguistic aspect played an important role in the new scheme. For instance, the State of Bombay was to be divided into two States: Maharastra and Gujrat, a provision which has recently been put into effect. It was a concession made to the cultural and linguistic aspirations of the Maharastrians and the Gujratis.

The non-Hindi speaking peoples in the different States in India were apprehensive of the invasion of the Hindi language at the cost of the regional languages. For instance, Bengalis are in a majority in West Bengal and it was their natural desire that their own language should find official recognition in their own State. Similar are the aspirations of the South Indians, who speak Tamil and Telugu. The Constitution therefore provides that a State Legislature may by law adopt Hindi or any one or more of the languages in use in the State as the language or languages to be used for all or any of the official purposes of the State: article 345.

Again, in a particular State, a linguistic minority may be of sufficient numerical strength to justify official recognition of their own language. In Assam, for instance, the Bengalis form a large linguistic minority and it is their desire that their language should be officially recognised in the State of Assam side by side with Assamese. The Constitution authorises the President of the Union of India, if satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by their State, to direct that such language also shall be recognised throughout the State or any part thereof for such purpose as he may specify: article 347.

Unfortunately, the rivalry between different linguistic groups is at times pursued with a fanaticism which a non-Indian may find hard to understand. Recently there was a persecution by Assamese of Bengalis in Assam where they are a minority though they are a majority in their own State, West Bengal. This persecution which involved many ugly incidents, including murder and arson, has demonstrated to what lengths linguistic fanaticism can go and that protective measures for linguistic minorities are of paramount importance. The tragedy of Assam has shown that the letter of the Constitution can do little to give effective protection to minorities unless the majority accepts the spirit of the Constitution which is to reconcile, and not to exacerbate. If, however, troubles have occasionally arisen in the adjustment of emotional relations between linguistic majority and

minority groups the reason is not the inadequacy of our constitutional safeguards but the failure of the men who were expected to make them work.

Part III of the Constitution (articles 13–35) contains the fundamental rights given to Indian citizens. It includes guarantees relating to religion, conscience, education, language and culture. The makers of our Constitution have made a noble effort to reconcile the conflicts which may arise between enacting social legislation in a secular State and granting full religious freedom to all citizens. All persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion, subject to public order, morality and health: article 25. Every religious denomination or any section thereof shall have the right to establish and maintain institutions for religious and charitable purposes, to manage its own affairs in matters of religion, to own and acquire movable and immovable property and to administer such property in accordance with law: article 26. The secular character of the State will appear from article 28 of which the main provisions are:

(a) no religious instruction shall be provided in any educational institution wholly maintained out of State funds; but this shall not apply to an institution administered by the State but established under any endowment or trust which requires that religious instruction shall be imparted in such institution;

(b) no person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

To appreciate the cultural and educational rights of the minorities, it will be necessary to examine the provisions of articles 15, 29, 30, 350A and 350B of the Constitution. While article 15 is of general application, the other articles mentioned above are primarily intended to protect the cultural and educational interests of the minorities.

Article 15 reads as follows:

> "*Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.*
>
> 15.—(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
>
> (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(*a*) access to shops, public restaurants, hotels and places of public entertainment or

(*b*) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes (inserted by the Constitution (First Amendment) Act, 1951)."

Articles 29 and 30 read as follows:

" *Protection of minorities.*

29.—(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

" *Right of minorities to establish and administer educational institutions.*

30.—(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

In 1957 the Government of Kerala introduced an Education Bill, which was challenged, *inter alia*, by the Christian community in the Supreme Court as affecting their fundamental rights under the above articles. Counsel for the State of Kerala contended that the " minority " entitled to fundamental rights under the above articles must be a minority in the particular district in which the particular school was being maintained; while the Christian community only accounted for one-quarter of the total population of the State of Kerala, it constituted a majority in many of the districts in which the schools were maintained, and was not accordingly entitled to constitutional " minority " guarantees in respect of such schools.

The word " minority " has nowhere been defined in the Constitution. The Supreme Court of India however held: " It is easy to say that a minority community means a community which is numerically less than 50 per cent., but then the question is not fully answered, for part of the question has yet to be answered, namely, 50 per cent. of what? Is it 50 per cent. of the entire population of India or 50 per cent. of the population of a State forming part of the Union?" Without attempting to express any final opinion, the Supreme Court held, for the limited purpose of examining the Kerala Education Bill, that the term " minority " as used in the Constitution must be determined by reference to the entire population of the State of Kerala.[3]

As a result of the recommendations made by the States Reorganisation Commission, the Constitution was amended by introducing articles 350A and 350B by section 21 of the Constitution (Seventh Amendment) Act, 1958. The Constitution guaranteed to the minorities the right to private schools but did not specifically recognise the right to instruction in the mother tongues of the minority groups in State schools. In view of the fact that some linguistic minorities do not have the resources required to establish and maintain their own educational institutions, the Commission felt that a positive duty should be cast upon the State in that respect.

Articles 350A and 350B read as follows:

" *Facilities for instruction in mother-tongue at primary stage.*

350A. It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities."

" *Special Officer for linguistic minorities.*

350B.—(1) There shall be a Special Officer for linguistic minorities, to be appointed by the President.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament, and sent to the Governments of the States concerned."

The earliest decision of the Supreme Court of India relating to the scope of article 29 is to be found in the case of *The State of Madras* v.

[3] *Re Kerala Education Bill, 1957, All India Reporter* (1958), Vol. 45, pp. 956, 976–977.

Sm Champakam Dorairajah.[4] In this case an order of the State distributing available seats in medical and engineering colleges according to a fixed formula based on community and caste, and irrespective of individual merit, was being challenged as contrary to article 29. The Supreme Court observed, " It will be noticed that while clause (1) protects the language, script or culture of a section of the citizens, clause (2) guarantees the fundamental rights of an individual citizen. The right to get admission into any educational institution of the kind mentioned in clause (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens. This right is not to be denied to the citizen on grounds only of religion, race, caste, language or any of them. If a citizen who seeks admission into any such educational institution has not the requisite academic qualifications and is denied admission on that ground, he certainly cannot be heard to complain of an infraction of his fundamental right under this article. But, on the other hand, if he has the academic qualifications but is refused admission only on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right." The impugned order of the State of Madras in that case, known as the Communal G.O., in fact, *inter alia,* provided that seats in the medical and engineering colleges apportioned between the four groups of districts were to be filled up according to certain proportions based on communal and caste considerations. For every fourteen seats, candidates were to be selected on the following basis: Non-Brahmins (Hindus) six; backward Hindus (two); Brahmins (two); Harijans two; Anglo-Indians and Indian Christians one; Muslims one.

While examining the effect of the impugned order on the fundamental rights of one of the petitioners, the Supreme Court said:

" Take the case of the petitioner Srinivasan. It is not disputed that he secured a much larger number of marks than the marks secured by many of the Non-Brahmin candidates and yet the Non-Brahmin candidates who secured a less number of marks will be admitted into six out of every fourteen seats but the petitioner Srinivasan will not be admitted into any of them. What is the reason for this denial of admission except that he is a Brahmin and not a Non-Brahmin. He may have secured higher marks than the Anglo-Indian and Indian Christians or Muslim candidates but, nevertheless, he cannot get any of the seats reserved for the last-mentioned communities for no fault of his except that he is a Brahmin and not a member of the aforesaid communities. Such denial of admission cannot but be regarded as made on ground only of his caste." It was therefore held that the classification in the impugned order was based on religion, race and

[4] *All India Reporter* (1951), Supreme Court, p. 226; (1951) *Supreme Court Reports,* p. 525.

caste and therefore constituted a clear violation of the fundamental rights guaranteed to the citizen under article 29 (2).

Champakam's case is important from another point of view. The State of Madras contended that article 29 (2) should be read with article 46 which requires the State to promote with special care the educational and economic interests of the weaker sections of the people, in particular, of the Scheduled Castes and the Scheduled Tribes. Having regard to article 46, it was argued that the State was entitled to maintain the impugned order. The Supreme Court rejected the contention on two grounds. In the first place, article 46 is contained in Part IV of the Constitution (articles 36–51) which is headed " directive principles of State policy." The Supreme Court held that directive principles, which by article 37 are expressly made unenforceable by a court, cannot override the " fundamental rights " found in Part III which, and notwithstanding other provisions, are expressly made enforceable under article 32 by appropriate prerogative writs, orders and directions. The Supreme Court observed: " The Chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate articles in Part III."

Secondly, it was pointed out that article 16—which guarantees the fundamental right of equality of opportunity in matters of public employment and prohibits discrimination on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them—contains an express provision in clause (4) permitting reservation of appointments or posts in favour of any backward class of citizens. The Supreme Court felt that the omission of a similar clause in article 29 was significant, and that probably the Constitution did not intend to introduce any communal considerations into matters of admission to any educational institutions which were maintained by the State or were receiving aid out of State funds. This decision was however partly nullified by the Constitution (First Amendment) Act, 1951. A clause similar to article 16 (4) was added to article 15 so as to bring articles 15 and 29 into harmony with article 16 and to permit reservation of seats for backward classes of citizens, Scheduled Castes and Tribes in public educational institutions. But such amendment does not make constitutional any discrimination on communal grounds between members *inter se* of a class which is not backward.

What the Constitution prohibits in article 29 (2) is denial of admission on grounds *only* of religion, race, caste, language or any of them. While article 15 (1) protects against discrimination generally, article 29 (2) is a protection against a particular species of wrong. It will have been noticed that " sex " and " place of birth " do not appear in article 29 (2).

There may be various kinds of permissible discrimination which are reasonable and which do not come within the mischief of article 29 (2). The point may be illustrated by referring to some cases decided in Indian courts. The High Court at Calcutta has held [5] that educational institutions intended exclusively for either men or women could be maintained by the State without a violation of the Constitution. The Allahabad High Court has held [6] that the principal of a college is entitled to refuse admission to a student in his college in the interest of college discipline; such action is not hit by article 29 (2). The High Court of Madhya Bharat has held [7] that a State can make a law limiting admissions to an educational institution of the State to residents of the State itself, and such law will not be unconstitutional inasmuch as there is no discrimination on any of the grounds prohibited by article 29 (2). The Kerala High Court had occasion to consider an order of the Government which directed that the seats in the Engineering and Medical Colleges would be distributed between Malabar area and Travancore-Cochin area, both within the Kerala State, on the basis of a certain ratio. The petitioner failed to secure admission in the Medical College because of the aforesaid distribution of seats. It was held by the High Court that the impugned order was not unconstitutional either under article 15 (1) or under article 29 (2). Residence and place of birth are two distinct conceptions with different connotations both in law and in fact and discrimination based on residence is not hit by article 15 (1). It is article 29 (2) and not article 15 (1) which prevails in matters of admission into educational institutions. The omission of the words "place of birth" in article 29 (2) is deliberate. A State might wish to open an institution for the advancement of knowledge in a particularly backward region and in order to carry out such object it might restrict admission to persons of the locality. If persons from other and more advanced regions are to insist on being admitted, the result would be that the persons in the backward region would be prevented for all time from improving their lot. The petition was accordingly dismissed.[8]

An interesting case came up before the High Court at Calcutta involving an apparent conflict between the rights given to the minorities under article 30 and the right to freedom of religion mentioned in article 25. St. Paul's College of Calcutta was originally founded in 1865 by the Church Missionary Society. The Society allowed its land

5 *Anjali Roy* v. *State of West Bengal, All India Reporter* (1952), Calcutta, pp. 822, 825.

6 *Ramesh Chandra* v. *Principal Bepin Behari, All India Reporter* (1953), Allahabad, p. 90.

7 *Rustom E. Modi* v. *State of Madhya Bharat, All India Reporter* (1954), Madhya Bharat, p. 119.

8 *Joseph Thomas* v. *State of Kerala, All India Reporter* (1958), Kerala, p. 33.

and buildings to be used for the purpose of the College on the understanding that the College would be run on the lines which the Society had laid down. The prospectus of the College allows full liberty of conscience to all students in the matter of personal devotions; but no acts of corporate worship which are contrary to Christian principles are allowed in the College. Admission into the College in terms of the prospectus implied an undertaking by the students to submit willingly to the rules and discipline of the College. The College receives recurring grants from the Government. Although it is a Christian College, over 90 per cent. of the students are Hindus.

A large number of Hindu students of the College applied to the Principal for permission to celebrate the worship of Saraswati (Hindu Goddess of learning) inside the College compound. If the request were granted, it would involve the installation of the idol of Goddess Saraswati within the College compound which would be contrary to Christian principles. The Principal accordingly refused to grant permission. Some of the Hindu students challenged the validity of the Principal's order under article 226 of the Constitution. Their main contention was that the order of refusal involves a breach of their fundamental right under article 25 of the Constitution. Sinha J. had no hesitation in rejecting this contention as thoroughly misconceived. He held that article 25 grants to a citizen the right to freedom of conscience and the right freely to profess, practise and propagate religion, but that does not mean that he could carry out the practices of his religion anywhere he chooses, even on the private property of others, in spite of the objection of the owner. The learned judge further said: "India is not a Hindu state but a secular state, where citizens may be Hindus or Christians or Moslems, but they are equally citizens of the state and their Gods cannot separate them. Consequently, the court cannot enforce the practice of any religion nor prohibit it, unless it militates against the provisions of the Constitution. Our Constitution, so far as I can see, has been broad-based on absolute tolerance of all religions."

Sinha J. further held that the Christians form a minority community in India and under article 30 Christian institutions, opened primarily for the propagation of Christian religion and secondarily for rendering humanitarian services including education, are within the bounds of law. Such an institution could not compel anyone to profess or practise the Christian religion, but it can lay down that all religious practices which will be carried out inside its precincts should be in conformity with Christian principles. The application was accordingly dismissed.[9]

[9] *Sanjib* v. *Principal, St. Paul's College*, Vol. 61, *Calcutta Weekly Notes*, p. 717.

In two comparatively recent decisions the Supreme Court pronounced its views in matters relating to the cultural and educational rights of the minorities. Both are regarded as of paramount importance in the development of the constitutional law in India. These are: (i) *The State of Bombay* v. *Bombay Education Society*; (ii) *Re Kerala Education Bill, 1957*. The judgment in the first case and the advisory opinion of the majority in the second were both delivered by S. R. Das, first a judge of the Supreme Court and then Chief Justice of India, and one of the very few, really great judges.

In the *State of Bombay* v. *Bombay Education Society*,[10] the facts briefly were: The Education Society of Bombay had been running a recognised Anglo-Indian School called Barnes High School which received aid from the State of Bombay. English was the medium of instruction in the school. The mother tongue of Anglo-Indians was English. The State of Bombay issued a circular on January 6, 1954, which provided that no primary or secondary school should from the date of the order admit to a class, where English was used as the medium of instruction, any pupil other than a pupil belonging to a section of citizens the language of which was English, which English-speaking section was defined in the circular to mean Anglo-Indians and citizens of non-Asiatic descent. One Major Pinto, a citizen of India and a member of the Indian Christian community, alleging English to be the mother tongue of his daughter, and one Dr. Gujar, another citizen of India and member of the Gujrati Hindu community, alleging Gujrati to be the mother tongue of his son, were refused admission to the school for their respective children on the basis of the aforesaid order. Applications were made under article 226 of the Constitution by the society and its two directors and also by Major Pinto and Dr. Gujar praying for the issue of a writ in the nature of mandamus restraining the State of Bombay from enforcing the said order, and to allow the school to admit children of non-Anglo-Indian citizens or of citizens of Asiatic descent, and to educate them through the medium of English. The High Court of Bombay made an order as prayed. The State of Bombay preferred an appeal to the Supreme Court.

Clause 7 of the impugned order provided that with a view to facilitating the admission of pupils who under the said order were not intended to be educated through the medium of English, schools using English as a medium of instruction (including Anglo-Indian schools) were advised to open progressively classes using Hindi or an Indian language as the medium of instruction.

The State of Bombay, basing itself upon the heading to article 29 (namely, "Protection of interests of minorities") contended that

[10] (1955) 1 *Supreme Court Reports*, p. 568.

article 29 (2) guaranteed the rights of minority groups only but did not confer any fundamental right on citizens generally. The Supreme Court held that the language of article 29 (2) is wide and unqualified and may well cover all citizens whether they belong to the majority or minority group. Thus, Dr. Gujar, although belonging to the Hindu majority community, was fully entitled to enjoy the fundamental right conferred by article 29 (2). Article 15 protects all citizens against discrimination generally; but article 29 (2) is a protection against a particular species of wrong, namely, denial of admission into educational institutions of the specified kind. Both these articles apply to citizens generally and are not limited to minority groups. The marginal note cannot be read as controlling the plain meaning of the language in which article 29 (2) has been couched.

It was further argued on behalf of the State of Bombay that the object of the impugned order was a laudable one. It was incumbent on the State to secure the advancement of Hindi which was ultimately to be the national language. It was also desirable that education should be imparted through the medium of the mother tongue of the pupil concerned. The Supreme Court held that however laudable the object of the impugned order might be, its validity had to be judged by the method of its operation, and by its effect on the fundamental right guaranteed by article 29 (2). The object was sought to be achieved by denying admission into any English medium school to all pupils, whose mother tongue was not English. The effect of the order involved an infringement of the fundamental right conferred by article 29 (2) and such effect was brought about by the fact that admission was being denied only on the ground of language. The Supreme Court, therefore, held that the impugned order offended against the fundamental right guaranteed to all citizens by article 29 (2).

The Supreme Court next considered the question, whether the impugned order infringed any constitutional right of the Anglo-Indian School. It held that there must be implicit in the fundamental right mentioned in articles 29 (1) and 30 (1) the right of Anglo-Indians to impart instruction in their own Anglo-Indian institutions to the children of their own community in their own language. "To hold otherwise will be to deprive article 29 (1) and article 30 (1) of the greater part of their contents. Such being the fundamental right, the police power of the State to determine the medium of instruction must yield to this fundamental right to the extent it is necessary to give effect to it and cannot be permitted to run counter to it."

The Supreme Court further held that the impugned order clearly prevented the Anglo-Indian schools from performing their constitutional obligations under article 337, to make at least 40 per cent. of the annual admissions available to members of other communities,

and thereby exposed such schools to the risk of losing the special grant. It was argued that the Anglo-Indian schools might still discharge their constitutional obligations by following the advice contained in clause 7 of the impugned order. But the Supreme Court held that such advice, if followed, would impose an additional burden on the Anglo-Indian schools to which they were not subjected by the Constitution itself. The impugned order was therefore declared unconstitutional.

In *Re Kerala Education Bill, 1957*, a reference was made by the President of India under article 143 of the Constitution to the Supreme Court for its advisory opinion which was duly given.[11] The Communist Government of the State of Kerala introduced a Kerala Education Bill, 1957, which contained many provisions imposing considerable State control over the management of educational institutions in the State. The Bill was passed by the State legislature on September 2, 1957, and was, under article 200, reserved by the Governor of Kerala for the consideration of the President. The extent of control sought to be introduced by the State appeared to the President to raise doubts about the constitutional validity of some of the provisions of the Bill. Accordingly the President referred the matter to the Supreme Court for its opinion.

The impugned provisions of the Bill were intended to give the State an extensive control over all schools, whether administered or aided or merely recognised by the government. The control of the government would extend to such matters as the appointment of teachers and their conditions of service, the appointment of managers, the supervision of the records, accounts, finance and the administration of the schools. All fees collected from the students in an aided school were to be made over to the government which would be responsible for the payment of salary to the teachers and the non-teaching staff. The government was further empowered, in certain circumstances, to acquire any school permanently upon payment of compensation or to take over its management for a temporary period. No fee was to be charged for tuition in primary classes in government schools or schools aided or recognised by the government. Provision was made for free and compulsory education of the children within a period of ten years.

The fundamental rights of the minorities were not challenged directly. The Bill merely regulated in many aspects the conduct of the schools which received State aid or which were recognised schools. The question, as it came before the court, was how far the Bill contained legitimate regulations and how far it produced a curtailment of fundamental rights.

11 *All India Reporter* (1958), Supreme Court, p. 956.

The first question which the Supreme Court had to answer was whether some of the aforesaid provisions offended article 30 (1) of the Constitution. The problem was examined from three different aspects. In the first place, it was held that so far as the Anglo-Indian schools entitled to a grant under article 337 were concerned, the impugned provisions offended article 30 (1) of the Constitution. An Anglo-Indian is defined in article 366 (2) of the Constitution as: "a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only." The Anglo-Indian community is a well-known minority community in India based on religion as well as language—Christianity is their religion and English is their language. Prior to 1948 the Anglo-Indian educational institutions used to receive grants from the government. Article 337 preserved this grant subject to a triennial diminution of 10 per cent. until the expiry of ten years when the grant, to the extent it was a special concession to that community, should cease. The second proviso to that article, however, imposed a condition that no such institution should be entitled to receive the said grant unless at least 40 per cent. of the annual admissions therein were made available to members of communities other than the Anglo-Indian community. The Supreme Court upheld the contention of the Anglo-Indian schools that the impugned provisions infringed their rights not only under article 337 but also violated their fundamental rights under article 30 (1) in that they were prevented from effectively exercising those rights. The Bill had tried to introduce additional conditions precedent to the constitutional right to receive grant. This was not permissible. Again, article 30 (1) conferred two fundamental rights upon the minority: (a) to establish and (b) to administer educational institutions of their choice. If the Anglo-Indian schools could not get grants except upon terms laid down by the provisions of the Bill they would have virtually to surrender their constitutional right of administering the schools of their choice in exchange for receiving aid from the government. No schools can in modern times afford to subsist and efficiently function without some State aid; yet, to obtain such aid, they are required virtually to give up their right of administration.

In the second place, the Supreme Court examined the provisions of the Bill in so far as they affected the rights of other minorities desirous of obtaining aid from the State and also Anglo-Indian schools receiving aid in excess of the amount due to them under article 337. While recognising that the provisions of the Bill made serious inroads on the right of administration and appear perilously near violating that right, the Supreme Court nevertheless held that many of the

said provisions were regulatory and were permissible and did not in fact violate article 30 (1). For instance, clauses 9, 11 and 12 of the Bill were designed to give protection to ill-paid teachers who are engaged in rendering services to the nation and to protect the backward classes. It was permissible to impose such conditions on any minorities which applied for grant of aid. The main reason why Supreme Court upheld such conditions as reasonable regulations is the constitutional right to administer cannot obviously include the right to maladminister. The minority surely cannot ask for aid or recognition for a school run by them in unhealthy surroundings, without any competent teachers or for a school which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars. Apart from the Anglo-Indians, no other minority has any constitutional right to receive aid from the State. The minorities other than the Anglo-Indians should therefore be prepared to submit to reasonable regulations as conditions for such aid.

The Supreme Court however held that clauses 14 and 15 of the Bill offended against article 30 (1) of the Constitution. These clauses provided for the taking over of schools by the State for a period not exceeding five years and also for compulsory acquisition of such schools in certain events. It was held that although right to aid was not implicit in article 30 (1), yet if a minority was compelled to submit to these provisions because they were necessary provisions for obtaining aid, such provisions, if upheld, might totally destroy the rights granted by article 30 (1).

The last category of minority schools examined by the Supreme Court were those which sought only recognition but not aid from the State. The minorities evidently desired that education should be imparted to their children in an atmosphere congenial to the growth of their culture. The makers of the Constitution recognised their claim and to allay their fears conferred on them the fundamental right referred to in articles 29 and 30. But the conservation of the distinct language, script or culture was not the only object of choice of the minority communities. They also desired that scholars of their educational institutions should go out in the world sufficiently equipped with the qualifications necessary for a useful career in life. They would be deprived of many such facilities unless they received recognition by the State. For instance, the Education Code in operation in Kerala provided that the scholars of unrecognised schools were not permitted to avail themselves of opportunities for higher education in the university and were not eligible for entering the public services. The majority view of the Supreme Court was that without recognition, the minority schools could not fulfil the real objects of their choice and could not

effectively exercise their rights under article 30 (1). It was further held by the majority in the Supreme Court: "There is, no doubt, no such thing as a fundamental right to recognition by the State, but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under article 30 (1). We repeat that the legislative power is subject to the fundamental right and the legislature cannot indirectly take away or abridge the fundamental rights which it could not do directly and yet that will be the result if the said Bill containing any offending clause becomes law." The Supreme Court held that many of the provisions of the Bill were regulatory in nature and were therefore permissible as conditions for recognition by the State. The majority view of the Supreme Court was that clause 20 of the Bill, which provided that no fee should be payable for any tuition in the primary classes in any government or aided or recognised schools, infringed the fundamental rights of minorities in respect of recognised schools to be established after the commencement of the Bill. If this Bill had become law all the schools would have had to forgo a fruitful source of income, yet there was no provision that the State would make good that loss, as clause 9 which contained a provision for compensation applied to aided schools only. To make it a condition for recognition that no fees were to be charged would make it impossible for any minority schools to be carried on. It is true that article 45 of the Constitution required the State to provide for free and compulsory education for all children, but in the opinion of the majority in the Supreme Court there was nothing to prevent the State from discharging that solemn obligation through Government and aided schools: article 45 did not require that obligation to be discharged at the expense of the minority communities.

It will be perhaps permissible to submit that in holding that article 30 of the Constitution is infringed by clause 20 of the Bill (that Government or aided or recognised schools should not charge any fees), the majority of the Supreme Court has given an extended meaning to the right conferred by article 30 (1). This meaning is much wider than would be warranted by the express terms of the article. In effect the majority of the Supreme Court has read into article 30 (1) of the Constitution an implied right of the minority institutions to be "recognised" by the State. There is no "fundamental right" of a minority school to be recognised by the State. To create such a right by implication is a breach of the well-known principle of construction that words are not to be introduced into a statute unless required to give effect to a manifest intention. Article 30 (1) confers upon the minorities

the right to establish and administer educational institutions of their choice. The minorities are free even under the Kerala Education Bill to exercise this right and are at liberty to charge whatever fees they like so long as they do not expect in terms of that Bill any aid from, or recognition by, the State. If a minority desires aid or recognition it is difficult to see why the obligation of free education in primary classes as mentioned in clause 20 of the Kerala Education Bill cannot be imposed by the State. Clause 20 of that Bill does not, *ex facie*, infringe the express terms of article 30 (1) of the Constitution. Some of these criticisms are expressed by Mr. Justice Venkatarama Aiyar, who gave a dissenting opinion in the Supreme Court on this point.

The dissenting judge further held that to imply in article 30 (1) such a right of minority schools to be recognised by the State might well be in conflict with the secular character of the State, which is the very foundation of our Constitution. Under article 30 (1) a minority may establish and administer a school for imparting purely religious instruction. To compel the State to give recognition to such an institution would indeed be inconsistent with the principles of a secular State. He points out that article 45 of the Constitution, which requires the State to provide for free and compulsory education for all children under the age of fourteen years within a period of ten years from the commencement of the Constitution, clearly negatives any such implied right. If the right of the minorities to establish and maintain schools of their choice under article 30 (1) carried with it an implied right to be recognised by the State, then no law of the State could compel them to admit students free and, therefore, article 45 could never become operative, since what it provides is free education for all children and not merely for children other than those who attend schools falling within article 30 (1). He summed up by saying that the Constitution has imposed two obligations upon the State and clause 20 of the Bill violated none. The obligations are: (a) a positive obligation to give equal treatment in the matter of aid or recognition to all educational institutions including those of the minorities—religious or linguistic; (b) a negative obligation not to prohibit their establishment or to interfere with their administration. According to the dissenting judge the true intention of article 30 (1) is to equip the minorities with a shield whereby they could defend themselves against attacks by majorities and not to arm them with a sword whereby they could compel the majorities to grant concessions. If the contention of the minority were upheld, it would mean discrimination by the State against the majority, because while the minority can collect fees from pupils, the majority cannot.

From the above discussion it will have been observed that the courts in India, particularly the Supreme Court, have applied what has been

described as the principle of protective discrimination in favour of religious and linguistic minorities in India. In a secular State with a vast Hindu majority, the makers of our Constitution have taken special care to allay all fears in the minds of the religious and cultural minorities in India who have thus been accorded a favoured treatment. In interpreting the Constitution, our judges have displayed a commendable sense of fair play and a spirit of religious tolerance which is true to the tradition of India, and which has been admirably epitomised in the National Anthem of free India.

CURRENT SURVEY

PAGE
United Kingdom 289
Commonwealth and Dependent Territories 313

This digest, which has been compiled by Gordon Borrie, Barrister-at-Law, covers the period April 1, 1961, to June 30, 1961.

UNITED KINGDOM

Courts

Lancashire Quarter Sessions

The Lancashire Quarter Sessions Act, 1961 (9 & 10 Eliz. 2, c. 14), received the Royal Assent on May 9, 1961. The Act makes further provision as to the chairmen and deputy chairmen of courts of quarter sessions in the county palatine of Lancaster.

Legal Aid and Advice

Account has been published of the receipts and expenses of the Law Society paid into and out of the Legal Aid Fund, 1959–60, together with the report of the Comptroller and Auditor-General thereon (H.C. 208 of 1960–61).

Assessment of Resources. The Legal Aid (Assessment of Resources) (Amendment) Regulations, 1961, amend the Legal Aid (Assessment of Resources) Regulations, 1960, so as to enable the National Assistance Board to make an estimate of the means of applicants for legal aid in matters of special urgency. This estimate is to be treated as if it were a determination by the Board under section 4 (6) of the Act and will accordingly be used by the committee for the purpose of deciding whether the applicant is eligible for legal aid and, if so, the amount of his contribution, if any (S.I. 1961 No. 555).

Extension of Legal Aid. The Legal Aid and Advice Act, 1949 (Commencement No. 10) Order, 1961, brought into force on May 8, 1961, the provisions of Part I of the said Act for the purpose of making legal aid available in connection with the following proceedings in any court of summary jurisdiction and in any court of quarter sessions, namely—(a) proceedings for or relating to an affiliation order within the meaning of the Affiliation Proceedings Act, 1957, or an order under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960; (b) proceedings under the Guardianship of Infants Acts, 1886 and 1925; (c) proceedings under the Small Tenements Recovery Act, 1838 (S.I. 1961 No. 554).

The Legal Aid (General) (Amendment) Regulations, 1961, make the amendments to the Legal Aid (General) Regulations, 1960, that are required by the introduction of legal aid for certain proceedings in courts of summary jurisdiction and quarter sessions (proceedings under the Affiliation Proceedings Act, 1957, the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, the Guardianship of Infants Acts, 1886 and 1925, and the Small Tenements Recovery Act, 1838). Most of the proceedings under these Acts are of a domestic nature.

Regulation 4 (*c*) allows the secretary of the appropriate Local Committee of the Law Society to grant but not to refuse applications for legal aid for the proceedings mentioned above. Applications which are not granted must be referred to the committee whose decision is, under regulation 6, final. Regulation 5 (*c*) provides, with a view to expediting the granting of legal aid in those proceedings, for an applicant to give an undertaking to pay such contribution as shall, in due course, be assessed in accordance with the Regulations.

Regulation 10 gives the Area Committees of the Law Society the duty of assessing the remuneration of counsel and the remuneration and expenses of solicitors, who give legal aid in these proceedings. These are to be assessed in accordance with the provisions of the Schedule to the Regulations, which is added in regulation 11 (S.I. 1961 No. 556).

Education

Scotland

Debate. On May 11, 1961, the House of Commons in Committee of Supply debated education in Scotland (640 H.C. Deb. 656–772).

Report. The report of the Secretary of State for Scotland on Education in Scotland in 1960 has been published (Cmnd. 1359).

Superannuation

The Superannuation (Teaching and Public Boards) Amending Rules, 1961, amend the Superannuation (Teaching and Public Boards) Rules, 1951, which provide for the preservation of the superannuation rights of persons who transfer from pensionable service under the Teachers (Superannuation) Acts to pensionable service under a Public Board, or vice versa. They add the British Broadcasting Corporation, the British Council, the British Overseas Airways Corporation and the British European Airways Corporation, the Forestry Commission and the National Dock Labour Board to the list of bodies which are to be treated as Public Boards for the purpose of the principal Rules. There are other minor and consequential amendments to the principal Rules (S.I. 1961 No. 745).

Universities

On May 18, 1961, the Chancellor of the Exchequer, in a written answer, said that the University Grants Committee had advised him that, within the scope of the building programme already announced, four new universities, in addition to those which are already being established at Brighton, Norwich and York, should be established as the best means of providing places for some of the increased numbers of students who will be coming forward in the coming years. The Committee has advised that three of the four should be at Canterbury, Colchester and Coventry. They are considering where the fourth should be located, and hope to report on this in the next two or three months. It is the Committee's view that the question of the establishment of any more universities beyond these four must await the report of the Committee on Higher Education under Lord Robbins. The Chancellor of the Exchequer said that he accepted this advice (640 H.C. Deb. 158–159).

Government Functions and Appointments

Agriculture

Agricultural Land Commission. The accounts have been published of the management and farming of land by the Agricultural Land Commission and the Welsh Agricultural Land Sub-Commission, 1959–60, together with the Report of the Comptroller and Auditor-General thereon (H.C. 159 of 1960–61).

Debate. On June 12, 1961, the House of Commons in Committee of Supply debated Agriculture in England and Wales (642 H.C. Deb. 36–162).

Diplomatic Immunities

The European Free Trade Association. The European Free Trade Association (Immunities and Privileges) Order, 1961, has been made. The European Free Trade Association was established by the Convention signed on January 4, 1960 (Cmnd. 1026), which was ratified by Her Majesty's Government and entered into force on May 3, 1960. This Order confers immunities and privileges upon the Association, representatives on its organs, its officers and experts employed on missions on its behalf, in accordance with the Protocol on the

Legal Capacity, Privileges and Immunities of the European Free Trade Association signed at Geneva on July 28, 1960 (Cmnd. 1194). It will come into operation on the date when this Protocol enters into force with respect to the United Kingdom (S.I. 1961 No. 1000). On April 25 and May 3, 1961, the House of Lords debated the extension of diplomatic immunity involved in this Order (230 H.L. Deb. 759–768, 1274–1295).

International Tin Council. On June 19, 1961, the House of Commons and the House of Lords approved, after debate, the draft International Tin Council (Immunities and Privileges) Order, 1961 (642 H.C. Deb. 1125–1130; 232 H.L. Deb. 404–409).

Organisation for Economic Co-operation and Development. The Organisation for Economic Co-operation and Development (Immunities and Privileges) Order, 1961, has been made.

This Order revokes the Diplomatic Privileges (Organisation for European Economic Co-operation) Order in Council, 1949, and provides for the immunities and privileges of the Organisation for Economic Co-operation and Development, representatives on its organs, its officers and experts employed on missions on its behalf in accordance with Supplementary Protocol No. 2 to the Convention establishing the Organisation which was signed at Paris on December 14, 1960 (Cmnd. 1257). It will come into operation on the date on which the Convention enters into force with respect to the United Kingdom (S.I. 1961 No. 836).

On April 25, 1961, the House of Lords debated the extension of diplomatic immunity involved in this Order (230 H.L. Deb. 768–780).

Inspectorate

Mines. The reports have been published of H.M. Inspector of Mines and Quarries, 1960: of the Durham Division (H.M.S.O. 41–28–6–60), of the Midland Division (H.M.S.O. 41–28–4–60), of the North Western Division (H.M.S.O. 41–28–5–60) and of the South Western Division (H.M.S.O. 41–28–7–60).

Police. The report has been published of H.M. Inspector of Constabulary for Scotland, 1960 (Cmnd. 1390).

Ministers' Functions

Department of Technical Co-operation. The Department of Technical Co-operation Act, 1961 (9 & 10 Eliz. 2, c. 30), received the Royal Assent on June 22, 1961. The Act establishes a Department of Technical Co-operation, under a Minister of the Crown known as the Secretary for Technical Co-operation, for the purposes of co-ordinating, promoting and carrying out arrangements for furnishing countries outside the United Kingdom with technical assistance, including in particular assistance in the fields of economic development, administration and social services. The annual salary paid to the Secretary for Technical Co-operation is not to exceed £3,750.

On June 1 and 8, 1961, the House of Lords debated the setting up of the new department on the second reading and committee stages of the Bill (231 H.L. Deb. 877–924, 1326–1332).

Health. Report of the Department of Health for Scotland, 1960, has been published in two parts: Part I, Health and Welfare Services (Cmnd. 1320); and Part II, Housing, Planning and Environment (Cmnd. 1361).

Labour. The annual report of the Ministry of Labour, 1960, has been published (Cmnd. 1364).

Post Office. The Post Office Act, 1961 (9 & 10 Eliz. 2, c. 15), received the Royal Assent on March 28, 1961.

This Act reorganises the financial arrangements of the Post Office. Section 1 establishes a new Post Office Fund under the control of the Postmaster-General into which he must pay all sums received by him and out of which all outgoings are to be paid, in each case with certain exceptions; section

2 provides for contributions to the Exchequer to be paid by the Postmaster-General in lieu of taxes, duties, fees, etc. (except stamp duty); section 3 contains provisions as to broadcasting revenue and expenditure; section 4 provides for the payment into the Exchequer of sums received by the Postmaster-General in lieu of fines; payments out of the Post Office Fund can only be made pursuant to annual affirmative resolution of the House of Commons (s. 5); section 6 lays on the Postmaster-General the duty of securing that his revenue meets his outgoings properly chargeable to revenue account taking one year with another and setting aside proper reserves; section 7 provides for the establishment and maintenance of a general reserve; section 8 provides for temporary borrowing by the Postmaster-General which may be guaranteed by the Treasury; section 9 provides for Exchequer advances; section 10 limits the aggregate borrowing of the Postmaster-General under the two preceding sections to £880 million or such greater sum not exceeding £960 million as the House of Commons may by resolution determine; section 11 provides investment powers; section 12 provides for accounts and reports; sections 13–20 contain provisions consequential on, or supplementary to, the foregoing sections and transitional provisions; section 21 amends the Post Office Act, 1953 (1 & 2 Eliz. 2, c. 36), s. 6 (2), in relation to the stamping of paper for use as postcards, envelopes, etc.; section 22 enables the Postmaster-General to charge a commission for payment of out-of-date postal orders; section 23 provides that documents purporting to be executed or signed by or on behalf of the Postmaster-General are deemed to be so executed or signed unless the contrary is shown and a certificate of such execution or signing signed by the Postmaster-General is conclusive evidence; the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), is applied to documents issued by the Postmaster-General by section 23 (3); section 24 provides for the destination of fines under the Post Office Act, 1953; section 25 amends the Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), in relation to persons licensed to deal in stamps; section 26, interpretation; section 27, provisions relating to Northern Ireland; section 28, consequential amendments; section 29, savings; section 30, short title, etc.

The Act, which extends to Scotland, Northern Ireland, the Isle of Man and the Channel Islands, came into force on April 1, 1961.

A statement has been issued by the Treasury in respect of loans proposed to be raised by the Postmaster-General (H.C. 194 of 1960–61).

Research

Agricultural Research Council. The report for 1959–60 has been published (Cmnd. 1362).

Department of Scientific and Industrial Research. The report of the Research Council, 1960, has been published (Cmnd. 1365).

Security

Romer Committee. On June 13, 1961, the Prime Minister made a statement in the House of Commons on the Report of the Committee of Inquiry into Breaches of Security at the Underwater Detection Establishment at Portland. In view of the special secrecy of some of the matters which the Committee, under the chairmanship of Sir Charles Romer, had to investigate, the Prime Minister felt that it would not be in the public interest to publish the full text of its Report. A summary of the Committee's findings, which the Government accept, is circulated in the official Report (642 H.C. Deb. 211–217; 232 H.L. Deb. 125–129).

Highways

Private Street Works

The Private Street Works Act, 1961 (9 & 10 Eliz. 2, c. 24), received the Royal Assent on May 18, 1961. This Act amends section 189 (1) of the Highways Act, 1959 (7 & 8 Eliz. 2, c. 25), by inserting the words " the occupiers " in the proviso thereto, thus bringing the provisions as to streets part only of

which are to be made up into line with those where the whole is required to be made up (s. 1); section 2 amends the law as to the liability of frontagers in cases where work is required to be done on private streets part of which had already been made up prior to January 1, 1960. Section 3, short title, etc. The Act, which does not extend to Scotland or to Northern Ireland, comes into force on June 18, 1961, one month after the date on which it received the Royal Assent.

The Ministry of Housing and Local Government has issued a circular explaining that the Ministry has had a survey made of the working of the arrangements for the making up of private streets and drawing to the attention of local authorities the reply of the Minister to a question by Colonel Sir Tufton Beamish, M.P., who asked him to make a statement about the survey. The Minister's general conclusions are that there is no ground for any fundamental change in the law relating to the making up of private streets. The purpose of the circular is to remind local authorities of the various means by which they can ensure that private street works charges are apportioned on as equitable a basis as possible (Circular No. 11/61).

Housing

House Purchase

Account has been published of the sums received by the Minister of Housing and Local Government from the Consolidated Fund for advances to building societies under section 1 (1) of the House Purchase and Housing Act, 1959, of sums received under section 2 (1) from those societies in respect of interest and repayment of advances, and of the disposal of those sums respectively in 1959–60, together with the Report of the Comptroller and Auditor-General thereon (H.C. 148 of 1960–61).

Returns

The Housing Returns for England and Wales (Cmnd. 1348) and for Scotland (Cmnd. 1349) for 1960–61 have been published.

Summary

A summary has been published of the number of new houses built in Great Britain up to May 31, 1961 (Cmnd. 1419).

Inquiries

Transport

Railway. The reports have been published on (a) the electrical fire on August 11, 1960, between Redbridge and Gants Hill on the Central Line, London Transport (March 14, 1961); (b) the collision on September 2, 1960, at Castle Cary (February 21, 1961); (c) the accident on December 2, 1960, at North Belton Occupation Level Crossing (February 6, 1961); (d) accidents and failures occurring in Multiple Unit Electric Trains in the Scottish and Eastern Regions, British Railways (May 30, 1961); (e) the accident on November 24, 1960, between Pontrhydyfen and Cwmavon (April 13, 1961).

Local Government

Elections

Election address. In The Matter of the Local Government Election for the Rural District of Hambledon (June 16, 1961) in the course of an election there was published on behalf of two of three candidates a notice to the electors which contained, *inter alia*, the printer's name and address and the names of the two candidates, but the notice omitted to give their addresses. Section 95 (1) of the Representation of the People Act, 1949, requires the names and addresses of both printer and publisher to be given, and subsection (3) declares that any person acting in contravention of that section should be guilty of an illegal practice. Section 145 gives the court the power to except an innocent act from being an illegal practice. The Divisional Court (Gorman

and McNair JJ.), *held*, granting relief under section 145, that the court had not the slightest doubt that relief should be given. See also *The Times*, June 17, 1961.

Welsh language. In *Re* CARMARTHENSHIRE COUNTY COUNCIL, AMMANFORD No. 2 DIVISION, ELECTION PETITION (June 9, 1961) an unsuccessful candidate in a Welsh county council election applied to the Divisional Court for the determination of two points: (1) whether it was possible to use the Welsh language on the prescribed nomination form; and (2) whether the indorsement on the petitioner's nomination form was one authorised by statute. The Divisional Court (Gorman and McNair JJ.) *held*, ordering a special case to be stated, that the two matters raised points of law. See also *The Times*, June 10, 1961.

Estoppel

Estoppel cannot be raised so as to hinder a local authority in the exercise of a discretion conferred on it by statute.

A borough engineer employed by a planning authority informed a builder that certain land had an existing user as a builder's yard, and the builder thereupon bought the land and so used it. The planning authority later considered that the land had no such existing user and served an enforcement notice on the builder, who appealed to the magistrates. The magistrates refused to allow the authority to give evidence that the existing user was not that of a builder's yard. *Held*, the case must be remitted to the magistrates to hear evidence on this point: SOUTHEND-ON-SEA CORPORATION *v.* HODGSON (WICKFORD) [1961] 2 All E.R. 46 (D.C.).

Finance

Borrowing. The accounts have been published of receipts and payments by the National Debt Commissioners in respect of the capital and income of the Local Loans Funds for 1959–60, together with the report of the Comptroller and Auditor-General thereon (H.C. 155 of 1960–61).

Rating and Valuation. The following decision has been reported on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955: *Re* HEADLANDS, PENARTH, TRUSTEES OF NATIONAL CHILDREN'S HOME AND ORPHANAGE (REGISTERED) *v.* PENARTH U.D.C., 125, J.P. 184 (C.A.).

Home Safety

The Home Safety Act, 1961 (9 & 10 Eliz. 2, c. 20), received the Royal Assent on May 18, 1961. This Act enables the councils of county districts or of metropolitan boroughs or the Common Council of the City of London to promote safety in the home by publishing or making arrangements for otherwise giving information or advice relating to the prevention of accidents in the home (s. 1 (1)) or by making contributions to any non-profit-making organisation carried on wholly or in part to promote safety in the home (s. 1 (2)). Section 1 (3) enables the local authority to recover their expenditure from moneys provided by Parliament by way of Rate-deficiency Grant or Exchequer Equalisation Grant.

The Act, which does not extend to Scotland or to Northern Ireland, came into force on May 18, 1961.

Local Government Commission

The Reports and Proposals of the Local Government Commission (Chairman: H. D. Hancock) have been published for the West Midlands Special Review Area, with Maps A to D (H.M.S.O. 75–79) and for the West Midlands General Review Area, with Maps A to C (H.M.S.O. 75–81).

The Commission recommended to the Minister of Housing and Local Government the setting up of five all-purpose authorities of county borough status for the Black Country, boundary changes for Birmingham, Coventry,

Stoke-on-Trent and Staffordshire and changes in the status of Burton-upon-Trent and Worcester.

The Minister is now inviting comments on these proposals. If there are objections public local inquiries will follow. At this stage the Minister has formed no view on what changes, if any, he will ultimately propose to Parliament.

The proposals are contained in two reports by the Local Government Commission for England on the West Midlands Special Review Area, consisting of Birmingham and the Black Country, and the West Midlands General Review Area, covering the rest of the five surrounding counties (Herefordshire, Shropshire, Staffordshire, Warwickshire and Worcestershire).

The Commission's main proposals for the Special Review Area are directed to the reorganisation of local government in the Black Country. In place of the present arrangements, which the Commission say are complex and difficult for the public to understand, they propose that all local government functions should be entrusted to five all-purpose authorities of county borough status. The Commission propose that the present authorities should be regrouped to form five county boroughs, each one to include an existing county borough:

Dudley county borough is grouped with Brierly Hill urban district and most of Sedgley and part of Coseley and Amblecote urban districts;

Smethwick county borough is grouped with Oldbury and Rowley Regis boroughs and part of Halesowen borough;

West Bromwich county borough is grouped with Tipton and Wednesbury boroughs and part of Coseley urban district;

Walsall county borough is grouped with Darlaston urban district, most of Willenhall urban district and part of Wednesbury borough;

Wolverhampton county borough is grouped with Bilston borough, Wednesfield urban district and part of Coseley, Sedgley, Tettenhall and Willenhall urban districts.

This, say the Commission, would be a simple and natural structure, more convenient for the public and the councillor and better able to meet the present and future needs of local government services.

The only changes proposed for Birmingham are minor boundary alterations. The Commission's draft proposals published in March 1960 included changes for the Quinton and Perry Barr areas of the city, but these and some other features of the draft proposals have now been dropped.

The Commission's chief recommendations for the West Midlands General Review Area are that Burton-upon-Trent and Worcester county boroughs should both become non-county boroughs, and that Coventry and Stoke-on-Trent county boroughs should have limited extensions, mainly at a number of points where suburban development straddles existing boundaries. The only other substantial county boundary change suggested is the transfer of most of Tamworth rural district from Warwickshire to Staffordshire.

London

Royal Commission. On May 16, 1961, the Minister of Housing and Local Government, in a written answer, said that the Government are still studying the report of the Royal Commission on Local Government in Greater London and the comments on it by local authorities and others (640 H.C. Deb. 122).

Meetings

The Ministry of Housing and Local Government has issued a circular drawing the attention of local authorities to the Public Bodies (Admission to Meetings) Act, 1960, which came into operation on June 1, 1961. The circular sets out certain principles which the Minister considers that local authorities should observe in their approach to the question of public relations with particular reference to relations with the Press. The local authority associations agree generally with these views. The circular points out that since a

local authority's deliberations sometimes concern the private affairs of individuals it is justifiable for part of a local authority's business to be conducted in private. However, matters of real importance to the locality ought to be openly debated, unless there are compelling reasons against publicity. Council meetings should not, as occasionally occurs, be merely formal proceedings in which proposals formulated and discussed in private are rubber-stamped without debate.

Where a committee consists of or includes all the members of a local authority, the Act applies to meetings of that committee as it does to meetings of the council; the public and Press may be excluded only on a resolution that certain business should, for stated reasons, be transacted in private. With such committees there is a particular likelihood that matters which ought to be openly debated will not be discussed in the council, and this provision secures that the public and Press shall have an opportunity of being present when the main discussion takes place. It has been brought to the Minister's notice that a few authorities, accustomed to committees consisting of all council members, might, if they wish the committees to meet in private, decide to meet the situation created by the Act by merely dropping one or two members. The Minister recognises that for the small authorities committees consisting of all or nearly all the members of the council may be the only convenient way to transact business; and that some of these committees may deal with matters which have to be discussed in private. In such a situation a reduction of the committees by one or two members might be the sensible arrangement. But what matters here is the nature of the business to be transacted. It would be quite wrong to use this device merely to defeat the purpose of the Act, and the Minister asks any authority which uses it to make sure that it does not result in the public and Press being excluded from discussion of matters which ought to be openly debated.

The Minister has received a good many representations about the desirability of arranging for greater publicity for planning applications; and he asks local planning authorities to review their present arrangements in the light of the following comments. Some people would like to see specific provision made for advertisement of all planning applications of any importance before decision is taken. The Minister does not believe that that would be right; it would in any event be bound seriously to increase delays, at a time when the great need is to speed up decisions. Planning applications are registered, and arrangements are already in force which secure publicity for many of them: under the Town and Country Planning Act, 1959, certain types of proposal relating to uses which may be particularly objectionable to neighbours have to be advertised: substantial departures from the development plan are also given publicity in appropriate cases: and there is publicity again when public inquiries are held by the Minister in connection with planning appeals and other planning procedures. But there are some planning applications not covered by these arrangements where, in the Minister's view, there is scope for greater publicity than at present. The applications which the Minister has in mind are those which, if carried out, would affect the whole of a neighbourhood and which are therefore of considerable interest to a good many people. These cases are, in any given planning area, not very numerous. Nor can they be satisfactorily defined in any legal instrument. It is a question of judging whether a particular proposal is of such interest to a considerable part of the community that it ought to be made publicly known, whether by direct notification to persons affected or by local publicity or both, and an opportunity given for anyone concerned to make his views known before a decision is taken. The Minister is aware that some authorities already go beyond their statutory obligations and when dealing with proposals publicise them and notify neighbours and others likely to be concerned, including local civic or amenity societies; but he would ask all authorities to consider whether enough is being done under their existing arrangements to secure appropriate publicity in cases of wide general interest. Local planning authorities will

still have to judge applications by principles which may not reflect the popular view in the immediate locality. Room has to be found for many developments which are not welcome neighbours. Permission often has to be given for some types of development, such as close-knit layouts of houses and flats in high blocks, which, however well designed, are apt to cause local objection as being likely to change the character of the neighbourhood or to affect familiar views. Even so, it may well be in the best interests of planning to enable local opinion to declare itself before any decision is taken (Circular No. 21/61).

Pecuniary Interest of Councillors

Officials of the Ministry of Housing and Local Government had discussions on May 4, 1961, with the Chairman of the General Purposes Committee, the Town Clerk and Deputy Clerk of the Bournemouth Corporation about the effect of section 76 of the Local Government Act, 1933 (which deals with the obligations of members of local authorities at meetings when they have pecuniary interests in any matters under consideration).

The Ministry pointed out that judicial interpretation of the section had made it clear that remote or hypothetical interests did not place members under any disability. Experience of the operation of these provisions during the past twenty-seven years, and the comparatively few cases in which proceedings had been taken in the courts for breach of them, did not indicate that, in practice, members of local authorities had found them unduly onerous. The subject is one of general concern to local authorities and it has received a good deal of attention by the local authority associations, including recent consultation with the Ministry. The council's representatives accordingly propose to recommend that the matter should be put before the Law and General Purposes Committee of the A.M.C.

Police

Dismissal of Chief Constable. A watch committee can dismiss a chief constable summarily under section 191 (4) of the Municipal Corporations Act, 1882, on the grounds of his unfitness for office. In exercising that power the committee is acting in a quasi-judicial capacity and so must observe the principles of natural justice. But those principles do not always require the committee to give the chief constable an opportunity of being heard, and in any case if the chief constable appeals to the Home Secretary against his dismissal he waives his right to complain of his not being heard by the committee.

The chief constable of a borough was employed "subject to the Police Acts and regulations." He was tried for certain crimes, of which he was acquitted, though his own evidence showed, and the judge at the hearing said, that he had failed to give the leadership required of him. The watch committee thereupon dismissed him under section 191 (4) of the Municipal Corporations Act, 1882. The chief constable was not present at the meeting at which that was done and he had not been told of any specific charges against him. He made an unsuccessful appeal against his dismissal to the Home Secretary under the Police (Appeals) Act, 1927, and later brought an action for a declaration that his dismissal was *ultra vires* and void; alternatively he sought damages for wrongful dismissal. *Held*, that nothing in the Police Act, 1919, or the Police (Discipline) Regulations took away the right of the watch committee to dismiss him under section 191 (4) of the Act of 1882, which was a "Police Act" within the meaning of his terms of service; that, though the committee had to act in accordance with natural justice, they had in all the circumstances done so; and that in any case by the appeal to the Home Secretary he had waived any right to bring the action: RIDGE *v.* BALDWIN [1961] 2 W.L.R. 1054; [1961] 2 All E.R. 523, Streatfeild J.

Pensions. The Police Pensions Act, 1961 (9 & 10 Eliz. 2, c. 35), received the Royal Assent on June 22, 1961. The Act provides for the consolidation, with or without changes authorised by the Police Pensions Act, 1948, of

regulations made under section 1 of that Act, and makes further provision for the application of the regulations in relation to special constables.

Rural Water Supplies

The Rural Water Supplies and Sewerage Act, 1961 (9 & 10 Eliz. 2, c. 29), received the Royal Assent on June 22, 1961. The Act amends section 2 of the Rural Water Supplies and Sewerage Act, 1944, which is concerned with contributions by county or county borough councils.

Scotland

The Local Authorities (Expenditure on Special Purposes) (Scotland) Act, 1961 (9 & 10 Eliz. 2, c. 32) received the Royal Assent on June 22, 1961. The Act amends section 339 of the Local Government (Scotland) Act, 1947, with respect to the purposes for which payments may be made thereunder.

Superannuation

The Superannuation (Local Government and Overseas Employment) Interchange (Amendment) Rules, 1961, relate to persons whose pension rights are governed by the Superannuation (Local Government and Overseas Employment) Interchange Rules, 1958, and were previously governed by the Superannuation (Local Government and Colonial Service) Interchange Rules, 1949. Under the latter rules, which were revoked by the 1958 rules, a person could have become entitled to receive a benefit in respect of his previous local government service if he retired on pension from the overseas employment, no matter what was the age of his retirement or the reason for it.

These rules restore that right to the persons affected, subject to the safeguards as to retrospective operation required by subsection (5) of section 2 of the Superannuation (Miscellaneous Provisions) Act, 1948, namely, that the person and the local authority affected in any particular case consent to the application of the rules (S.I. 1961 No. 770).

The Ministry of Housing and Local Government has issued a Circular explaining the Rules (Circular No. 16/61).

Monopolies and Restrictive Practices

Restrictive Practices Court

Decisions. The court's powers under section 20 (4) of the Restrictive Trade Practices Act, 1956, are not limited to restraining giving effect to the actual restrictions condemned in its judgment. Where a trade association does not itself carry on business, it will not be restrained by the court's order. Service of the injunction on members of a large association may be ordered to be effected by post: *Re* Wholesale Confectioners' Alliance's Agreement (No. 2) [1961] 1 W.L.R. 613; 105 S.J. 284; *sub nom. Re* Wholesale Confectioners' Alliance of Great Britain and Northern Ireland's Agreement (No. 2) [1961] 2 All E.R. 8 (R.P.Ct.).

A federation of cement makers fixed prices at which members were to sell their cement, prescribed profit margins for wholesalers and rebates for large users, and restricted the length of contracts into which members might enter. The selling price of a member's cement increased with the distance at which it had to be delivered, and gave members an incentive to sell near their own works, and to site their works near to their market. The prices were recommended by an independent committee and gave a low profit margin to members. In general there was a sellers' market in cement. *Held,* the price structure and profit margin were not contrary to the public interest, but that the rebates and restrictions on length of contract were so: *Re* Cement Makers' Federation Agreement [1961] 1 W.L.R. 581; [1961] 2 All E.R. 75 (R.P.Ct.).

An association of manufacturers fixed minimum prices for various classes of transformers and associated equipment, basing the prices on an average of the three lowest costings returned by members. *Held,* (a) that the association

could take all the restrictions together for the purpose of its argument under section 21 (1) (*b*) and (*f*) of the Restrictive Trade Practices Act, 1956, and isolate one class of restrictions from the rest for the purposes of its argument under section 21 (1) (*d*); (b) that "earnings" in section 21 (1) (*f*) meant "turnover" and not "profits"; (c) that in determining whether a particular person was a "preponderant" purchaser, purchasers in counties not covered by a particular restriction could be disregarded; (d) on the evidence, that the association had not satisfied the court of any of the circumstances set out in section 21 (1) (*b*) (*d*) or (*f*): *Re* Associated Transformer Manufacturers' Agreement [1961] 1 W.L.R. 660; [1961] 2 All E.R. 233 (R.P.Ct.).

In a reference concerning the British Bottle Association's Agreement it was alleged in defence of the restrictions it contained that if they were removed there would be likely to be a "price war" which would bring with it the concomitant disadvantages to purchasers of lower quality, worse service, instability of prices and an ultimate emergence of more or less monopolistic conditions with a higher general level of prices, so that the loss of the agreement would deprive the public of specific and substantial benefits under section 21 (1) (*b*) of the Restrictive Trade Practices Act, 1956. *Held,* that on the evidence price competition in the industry was unlikely to lead to any disastrous consequences for the industry itself, let alone for purchasers of glass bottles, and accordingly the restrictions must be declared contrary to the public interest: *Re* British Bottle Association's Agreement [1961] 1 W.L.R. 760; [1961] 2 All E.R. 208 (R.P.Ct.).

National Health Service

Charges

The National Health Service Act, 1961 (9 & 10 Eliz. 2, c. 19), received the Royal Assent on May 9, 1961. This Act increases the charge under the National Health Service Act, 1951 (14 & 15 Geo. 6, c. 31) for one denture by 5s., the maximum charge for more than one denture by 15s. and the maximum charge for general dental services which include the provision of dentures to £5 (s. 1 (1)); section 1 (2) increases from 10s. to 12s. 6d. the charge per lens for glasses other than children's glasses, and increases the charge per bifocal lens in such glasses from 10s. to £1; section 1 (3) exempts expectant and nursing mothers, children under sixteen, and children over 16 receiving full time education from any charge for dentures or alterations thereto; section 1 (4) permits the supply of lenses free of charge to children over ten and under 16 and children over 16 receiving full time education if they are fitted into ordinary health service frames; section 1 (5) provides for the making of regulations (subject to negative resolution in either House of Parliament, s. 1 (6)) in relation to the above exemptions. Section 2 gives the Minister of Health in England and Wales (and the Secretary of State in Scotland) power to vary charges for dental and optical appliances and dental treatment by regulations subject to negative resolution in either House of Parliament. Section 3 interpretation; section 4 financial provisions; section 5 short title, etc.

This Act and the National Health Service Acts, 1946 to 1952 (9 & 10 Geo. 6, c. 81; 12, 13 & 14 Geo. 6, c. 93; 14 & 15 Geo. 6, c. 31; 15 & 16 Geo. 6 & 1 Eliz. 2, c. 25), may be cited together as the National Health Service Acts, 1946 to 1961, and this Act and the corresponding Scottish Acts (the National Health Service (Scotland) Acts, 1947 to 1952) may be cited together as the National Health Service (Scotland) Acts, 1947 to 1961.

The Act, which extends to Scotland, but not to Northern Ireland, came into force on May 16, 1961, seven days after it received the Royal Assent.

On April 11, 1961, the House of Lords debated National Health Service charges on the second reading of the Bill (230 H.L. Deb. 237–251).

Contributions

The National Health Service Contributions Act, 1961 (9 & 10 Eliz. 2, c. 13), received the Royal Assent on March 28, 1961. This Act raises the rates of

national health service contributions from a day to be appointed (s. 1 and Sched. I), the increase is 10d., 8d., and 6d. respectively for an employed man, woman, or boy or girl, and 2d. for an employer in each case; the increase is 8d., 6d., and 4d. respectively for a self-employed or non-employed man, woman or boy or girl; section 1 (3) and Sched. II contain consequential amendments of the National Health Service Contributions Act, 1957 (5 & 6 Eliz. 2, c. 34), and provide (*inter alia*) that the Treasury shall in future make any special provision with respect to masters and crews of foreign-going ships.

This Act and the National Health Service Contributions Act, 1957 (5 & 6 Eliz. 2, c. 34), may be cited together as the National Health Service Contributions Acts, 1957 and 1961.

The Act, which extends to Scotland, but not, save for section 1 (4), to Northern Ireland, came into force on March 28, 1961.

The National Health Service Contributions Act, 1961 (Appointed Day) Order, 1961, appointed July 3, 1961, to be the day on which the increased rates of contributions provided by the Act came into operation. (S.I. 1961 No. 627).

Hospital Service

On April 26, 1961, the House of Lords debated the Hospital Service. (230 H.L. Deb. 851–873, 882–960).

Mariners

The National Health Service (Employers of Mariners Contributions) Amendment Regulations, 1961, amend the National Health Service (Employers of Mariners Contributions) Regulations, 1957, following the passing of the National Health Service Contributions Act, 1961. They have the effect of increasing by a penny to threepence halfpenny the existing employer's contribution in the case of mariners who are domiciled or resident in the United Kingdom and are employed in foreign-going ships (S.I. 1961 No. 751).

Meetings

The Ministry of Health has issued a Circular drawing the attention of the clerks of executive councils to the Public Bodies (Admission to Meetings) Act, 1960, which came into force on June 1, 1961. The Act enables the press and public to attend not only meetings of executive councils, but also meetings of any of their committees which consist of or include all members of the council. The Act applies to executive councils only so far as regards the exercise of their executive functions. In the Minister's view councils are not acting in an executive capacity when they are dealing with any matter relating to an individual case under the National Health Service (Service Committees and Tribunals) Regulations, 1956.

In cases to which the Act applies councils will be able, by resolution, to exclude the public from the whole or part of a meeting whenever publicity would be prejudicial to the public interest by reason of the confidential nature of the business to be transacted or for other special reasons stated in the resolution, and arising from the nature of the business or of the proceedings; special reasons may include the need to receive and consider recommendations or advice from sources other than members or committees or subcommittees of the council, irrespective of the subject or purport of the recommendations or advice. (Circular No. E.C.L. 53/61.)

Scotland

Appointment of Boards of Management. The National Health Service (Appointment of Boards of Management—Consequential Provisions) (Scotland) Order, 1961, has been made.

Following upon a revised scheme under section 11 of the National Health Service (Scotland) Act, 1947, for the appointment of Boards of Management, the functions of the Board of Management for Angus Hospitals and the

Board of Management for Stracathro and Brechin Hospitals have been terminated and a new Board appointed, the Board of Management for the County of Angus General Hospitals. This Order makes provision for the transfer of all rights and liabilities accordingly (S.I. 1961 No. 757).

Scottish Health Services Council. The Report of the Council for 1960 has been published (H.M.S.O. 49-412-0-60).

See also NATIONAL INSURANCE (below).

NATIONAL INSURANCE

Accounts

The Accounts have been published of the National Insurance Fund, the National Insurance (Reserve) Fund, the Industrial Injuries Fund and the National Insurance (Existing Pensioners) Fund, for 1959–60, together with the Report of the Comptroller and Auditor-General thereon (H.C. 170 of 1960–61).

Contributions

The National Insurance (Collection of Graduated Contributions) Amendment Regulations, 1961, extend the principal regulations so as to include graduated contributions payable in respect of seamen within the Pay-As-You-Earn Scheme for the purposes of payment, accounting and recovery (S.I. 1961 No. 598).

The report of the National Insurance Advisory Committee on the preliminary draft of these Regulations has also been published (H.C. 157 of 1960–61).

The National Insurance (Contributions) Amendment Regulations, 1961, which amend the National Insurance (Contributions) Regulations, 1948, provide that a woman who is excepted from liability to pay contributions under the National Insurance Act, 1946, because she is, as a widow, receiving death benefit under the National Insurance (Industrial Injuries) Act, 1946, or a pension or allowance under a Personal Injuries Scheme, Service Pensions Instrument or 1914–18 War Injuries Scheme, shall not lose her exception by reason only of an increase in the standard rate of widow's pension under the National Insurance Act, 1946 (S.I. 1961 No. 867).

The report of the National Insurance Advisory Committee on the preliminary draft of these Regulations has also been published (H.C. 203 of 1960–61).

Decisions of the Commissioner

Apprenticeship. A woman claimed an increase of sickness benefit in respect of her daughter aged sixteen and a half who was employed on ordinary office work under supervision. There was no written contract or indenture. She did not attend courses or have a set course of training although her employers had expressed their willingness to release her on two days a week for a course in shorthand and typing. *Held* that the claimant's daughter was not an apprentice within the meaning of section 23 of the Family Allowances Act, 1945, and accordingly the claimant was not entitled to an increase of benefit in respect of her. Meaning of "apprentice" discussed and *Fraser* v. *Minister of National Insurance,* 1947 S.C. 595 applied. Decision R(F) 5/60 referred to. Decision No. R(S) 1/61.

Normal course of working. A foundry labourer claimed benefit for a Saturday. He had worked on fewer than half of the Saturdays in the preceding year. For over twenty years most workers at his place of employment had normally worked a five-day week, Monday to Friday, but the claimant and a few others had also to work on Saturday in preparation for the general work of the foundry in the following week. Similarly, when most of the workers worked on fewer than five days the claimant always worked on one day more than they. He was paid at overtime rates for his Saturday work, under a national agreement governing his industry. His loss of Saturday work in the

year preceding his claim was due to adverse industrial conditions, which caused the foundry in general to work on four days instead of the usual five. *Held* that benefit was payable. The nature of the claimant's employment and the long-standing regular practice extending over a great many years showed that his "standard working week" was one of six days. The weeks in the year preceding his claim when he worked on fewer than six days were therefore weeks of short-time working due to adverse industrial conditions. In examining his record of employment for the purpose of deciding his normal course of working such weeks fell to be disregarded. Saturday was therefore found for him to be a normal working day. Decision No. R(U) 2/61.

Notice of prior de-retirement. Claimant gave notice that he had retired on December 5, 1958, and was duly awarded and paid retirement pension. He was employed for two weeks in January, 1959, which employment he described as temporary. He resumed his former regular employment with his former employers on March 2, 1959. He reported this and declared his earnings in August, 1959, in the meantime he did not draw any pension. His contribution card when received showed that full rate contributions had been paid from March 2, 1959. Following inquiries the claimant completed on December 15, 1959, a notice of election to be treated as not retired from March 2, 1959. *Held* that as regulations made no provision for a notice of election specifying a date of de-retirement earlier than the date on which it was completed, such a notice could not be effective earlier than the date on which the notice was given. The prescribed form of notice warned the applicant that the effective date could not be earlier than the date of application and therefore the entry of the earlier date could be treated as surplusage. The earnings declaration, completed in August, 1959, could not be construed as a notice of de-retirement because giving such notice is a very important step and a document should not be so construed unless it is clearly intended to be one. Decision No. R(P) 1/61.

Seasonal worker. A seasonal worker claimed benefit during an off-season which began on November 23, 1958. She would not have satisfied the condition as to registration of a seasonal worker for employment if it had been appropriate to examine her record of registration in the preceding two years. It was therefore necessary to decide when she became a seasonal worker. The date by which it could be said that for three years she had no substantial employment other than seasonal employment was April 16, 1958. Since that date there had been only an "inconsiderable period" when she was not registered for employment. *Held* that throughout the period of claim in her off-season the claimant satisfied the condition relating to registration for employment. The "day on which she became a seasonal worker" was April 16, 1958, and it was from that day, being less than two years before all days for which benefit was claimed, that she had to be registered. Decision No. R(U) 4/61.

Non-Participation

For new sets of regulations, see S.I. 1961 Nos. 559, 588, 607, 608, 910, 1083.

Pension Increments for Wives and Widows

The National Insurance Advisory Committee has issued a Report on the conditions on which increases of retirement pension can be awarded under sections 20 (2) and 21 (3) of the National Insurance Act, 1946, to married women and widows in respect of contributions paid after pensionable age by them or by their husbands. The Committee agreed that there are inequalities in the present position as it affects younger wives and widows and that these have led to a widespread feeling of unfairness which, in the Committee's view, is of sufficient seriousness to justify an improvement in conditions. These inequalities could not be rectified completely without fundamental

changes in the structure of the 1946 scheme which it was outside the Committee's terms of reference to consider. However, the Committee felt that the increments arrangements for widows can and should be improved so that younger wives are entitled, on widowhood, to a share of any increments earned by their late husbands (Cmnd. 1384).

Report

An Interim Report by the Government Actuary has been published on the operation of the National Insurance Acts for the year 1959–60. (H.C. 222 of 1960–61.)

Retirement Benefits

Debate. On April 27, 1961, the House of Commons debated the new graduated pensions scheme (639 H.C. Deb. 638–696).

Regulations. The National Insurance (Graduated Retirement Benefit and Consequential Provisions) Regulations, 1961, provide that the right to graduated retirement benefit under the National Insurance Act, 1959, at less than a prescribed weekly rate, of a person who is not entitled to a retirement pension under the National Insurance Act, 1946, may be satisfied by a single payment and prescribe the circumstances in which the provision is to apply and the amount of the single payment in relation to the age of the person.

The Regulations also prescribe that the conditions for a widow's entitlement to graduated retirement benefit in respect of a husband she married after attaining pensionable age shall be the same as those she is required to satisfy for entitlement to a retirement pension by virtue of his insurance, and enable a woman more than once married, who is entitled to graduated retirement benefit as a widow in respect of a second or subsequent husband, to retain her entitlement to such graduated retirement benefit in respect of a former husband as she has earned by deferring her own retirement from regular employment on attaining pensionable age. Provision is also made for treating graduated retirement benefit as an increase of widowed mother's allowance instead of as an increase of her retirement pension where this is equally or more beneficial to the widow.

The remaining provisions of the Regulations make certain amendments to regulations under the National Insurance Act, 1946, required in consequence of the scheme of graduated retirement benefit introduced by the National Insurance Act, 1959 (S.I. 1961 No. 557).

The report of the National Insurance Advisory Committee on the preliminary draft of these Regulations has also been published (H.C. 156 of 1960–61).

Turkey

The National Insurance and Industrial Injuries (Turkey) Order, 1961, gives effect in England, Wales and Scotland to the Convention (set out in the Schedule) made between the United Kingdom and Turkey insofar as it relates to the matters for which provision is made by the National Insurance Acts, 1946 to 1960, and the National Insurance (Industrial Injuries) Acts, 1946 to 1960 (S.I. 1961 No. 584).

National Insurance (Industrial Injuries)

Colliery Workers

The National Insurance (Industrial Injuries) (Colliery Workers Supplementary Scheme) Amendment Order, 1961, varies and amends the provisions of the National Insurance (Industrial Injuries) Colliery Workers Supplementary Scheme. Rates of supplementary pension payable to widows and to women having the care of children of deceased colliery workers are raised, and the rates or amounts of supplementary contributions payable under the Scheme are increased. Provision is made for the adjustment of the amount of supplementary benefit payable in certain cases where a colliery worker is in receipt

of an incapacity retirement pension under the Mineworkers' Pension Scheme. The list of authorised securities is revised, and the proportion of the Fund's assets which may be invested in preference, preferred or ordinary stock or shares is increased from 30 to 50 per cent. Other amendments are of a minor or consequential character. For convenience of reference, the text of the Scheme, as amended by the Orders of 1950, 1952 and 1953, by the two Orders of 1955, by the Order of 1958 and by this Order, is set out in full in the schedule to the Order (S.I. 1961 No. 602).

Decisions of the Commissioner

Coronary Thrombosis. A minor received a blow on the chest at work. Later in the day he felt a pain in his chest. He continued at work although under investigation for the chest pain. Five weeks later he felt a severe pain in his chest when pulling a heavy conveyor chain. He was certified incapable of work. Hospital investigation showed that the claimant's incapacity was due to myocardial infarction following coronary thrombosis. *Held* that the incapacity due to coronary thrombosis did not result from either the blow on the chest or pulling the conveyor chain. Relationship between coronary thrombosis and direct trauma to the chest discussed. Decision No. R(I) 5/61.

Heat Stroke. A seaman, while resting between watches when at sea in the Arabian Sea, died from heat stroke of the fulminating type caused by the heat and excessive humidity existing immediately before his collapse. *Held* that his death resulted from injury by accident arising out of and in the course of his employment, because the combination of heat and humidity which caused the heat stroke was a special risk of the claimant's employment totally different from any risk that he would have run at home. Aetiology of heat stroke and heat exhaustion considered. Decision No. R(I) 4/61.

Prescribed Disease. The claimant, after working in a lead works, was found in March, 1945, to be suffering from lead poisoning. This was a scheduled disease under the Workmen's Compensation Acts, and for a period of eighteen months only he received compensation. He has not worked in a prescribed occupation for that disease since the appointed day. In November, 1958, the claimant became incapable of work as a result of lead poisoning and claimed injury benefit. *Held* that since he had not worked in a prescribed occupation since the appointed day he was at no time insured against the prescribed disease within the meaning of section 55 (1) of the Act of 1946. Accordingly, the Workmen's Compensation Acts continue to apply in this case because the exception to the proviso to section 89 (1) of the 1946 Act does not apply and the right to compensation arises in respect of employment before the appointed day. Decision No. R(I) 7/61.

Prescribed Diseases

The National Insurance (Industrial Injuries) (Prescribed Diseases) Amendment Regulations, 1961, by amending paragraph 23 of Part I of the First Schedule to the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1959, extend insurance under the National Insurance (Industrial Injuries) Act, 1946, to dystrophy of the cornea of the eye in the case of persons insurably employed in certain occupations involving exposure to quinone or hydroquinone.

In addition they contain transitional provisions relating to persons who have worked in any such occupation since July 5, 1948, and who have already died as a consequence of the disease or are suffering from it on the date when these Regulations come into operation (S.I. 1961 No. 691).

Report

An Interim Report by the Government Actuary has been published on the operation of the National Insurance (Industrial Injuries) Acts for the year 1959–60 (H.C. 217 of 1960–61).

See also NATIONAL INSURANCE (above, p. 301).

Nationalised Industries

General

Finance. The Government has issued a White Paper on the Financial and Economic obligations of the Nationalised Industries, reviewing the experience in applying the general principles established in the nationalising statutes, and containing suggestions for future interpretations framed after consultation with the Boards.

According to the White Paper, the Government's general policy is to ensure that the industries are organised and administered efficiently and economically. Although they have varying obligations of a national and non-commercial kind, they ought not to be regarded as social services absolved from economic and commercial justification. The undertakings have been expected to "pay their way," *i.e.*, on an average of good and bad years, to have not less than sufficient revenues to meet proper charges, including provision of reserves. It was envisaged that there would be surpluses in good years, after making all necessary provisions, and that these surpluses would be available to meet deficits in bad years. In practice, however, the total retained income of all these industries has not been sufficient to provide for the replacement of assets used up in the production process, and this is also the case in most of the individual industries concerned. But results vary from industry to industry, as is to be expected. Some are expanding rapidly, others contracting; some are competitive, others are monopolistic; and non-commercial considerations vary. So financial results alone do not fully measure efficiency. A simple comparison with the return on capital in private industry—which has been about 15 per cent. in recent years against less than 5 per cent. in most nationalised undertakings—would be misleading. In public utilities a lower return on capital is traditional, nationalisation has aroused expectation of cheap products and services, and there are onerous national obligations to carry. The White Paper points out, however, that if the profitability of capital development is assessed on different (and easier) financial criteria from those adopted in industry generally, there is a risk that too much of the nation's savings will be diverted into the nationalised industries. Again, if the prices of the goods and services which the nationalised industries provide are uneconomically low, demand for them (and for investment to produce more of them) may be artificially stimulated. Taking all these considerations into account, the Government consider that, in general, the statutory financial objectives of the nationalised undertakings should be more precisely interpreted and defined as follows:

Over a five-year period surpluses on revenue account should be at least sufficient to cover deficits on revenue account, which should include interest and depreciation on the historic cost basis, while provision should also be made from revenue for the additional cost of depreciation on a replacement cost basis and for allocations to general reserves. The White Paper points out that earning power, total depreciation provision and reserve requirements will vary according to the prospective commercial, technological and financial developments of different undertakings. In consequence, the above criteria cannot be expressed as one standard formula to be applied to all alike.

"The objective for each undertaking will be determined in the light of differences in circumstances, needs and capabilities in relation to the criteria . . . For some, the objectives may be expressed in terms of progress towards an appropriate level of self-financing of their capital expenditure, concurrently with the provision of suitable contributions to reserve. For others, the objective may be in terms of a specified rate of return on capital employed."

Existing procedures concerning investment and borrowing will continue. Under these, the Government will discuss development plans for five years ahead, will fix annually an upper limit for investment spending for two years, will approve borrowings on the basis of annual estimates, and will require to

be informed of new proposals expected to yield a low return. The Government's two interests here are in keeping public sector investment within the nation's resources, and providing public capital. Recognising the force of arguments in favour of undertakings seeking funds in the capital market the Government see no possibility of an early move in this direction. "The amounts of money needed are much too large to be raised in the open market without Government support, and the industries are, of necessity, closely associated in the public mind with the Government, so that it would be difficult for the market to regard them as independent financial concerns."

The above procedures on revenue and capital account will apply as long as performance and prospects are satisfactory. In other cases the Government would take a closer interest, and—through the minister—require plans to improve the situation.

The aim of the industries generally will naturally be to secure the necessary additions to their net revenue as far as possible by reductions in costs. For a variety of reasons, such as fructification of investment and reduction of unprofitable activities, combined with continuing improvements in commercial efficiency, some of the industries will be capable of increased productivity, part of which should be available to improve their financial results. The Government recognise, however, that the industries must have freedom to make upward price adjustments, especially where their prices are artificially low. The White Paper accepts that ministerial intervention to keep prices down, when a board thinks they need to be raised, can be published and any necessary adjustment made in the board's financial objective. To the extent that commercially unprofitable activities are imposed, a board would be entitled to ask for an adjustment of its financial objectives.

The White Paper concludes: "The nationalised industries are from their size and nature bound to play a major role in the economic life of the country. They cannot, however, be regarded only as very large commercial concerns which may be judged mainly on their commercial results: all have, although in varying degrees, wider obligations than commercial concerns in the private sector. The object of these proposals is to find for each industry or board a reasonable balance between these two concepts." It is hoped that the new arrangements will improve performance and morale and reduce the need for outside interference (Cmnd. 1337; Commonwealth Survey, C.O.I., April 25, 1961).

Airways

Guarantees. Statements have been issued by the Treasury on loans proposed to be raised by B.E.A. (H.C. 171 of 1960–61) and B.O.A.C. (H.C. 172 of 1960–61).

Atomic Energy

Balance Sheet of the United Kingdom Atomic Energy Authority has been published as at March 31, 1960, together with the Report of the Comptroller and Auditor-General thereon (H.C. 182 of 1960–61).

Coal

Report and accounts of the National Coal Board, 1960, have been published in two parts (H.C. 195, 196 of 1960–61).

Electricity

Guarantees. Statements have been issued by the Treasury on loans proposed to be raised by the Electricity Council (H.C. 173 of 1960–61), the North of Scotland Hydro-Electric Board (H.C. 175 of 1960–61) and the South of Scotland Electricity Board (H.C. 176 of 1960–61).

Gas

Guarantee. A statement has been issued by the Treasury in respect of loans proposed to be raised by the Gas Council (H.C. 174 of 1960–61).

Transport

Accounts have been published of the sums received by the Minister of Transport from the Consolidated Fund and from the British Transport Commission in respect of interest and repayment of advances, and the disposal of those sums respectively, 1959–60, together with the Report of the Comptroller and Auditor-General thereon (H.C. 183 of 1960–61).

Consultative Committees. Reports have been published for 1960 of the Canal Committee, the Committee for Scotland and the Committee for Wales and Monmouthshire (H.C. 151, 152 and 153 of 1960–61).

Guarantee. A statement has been issued by the Treasury in respect of loans proposed to be raised by the British Transport Commission (H.C. 177 of 1960–61).

Reports and accounts of the British Transport Commission for 1960 have been published in two volumes (H.C. 213, 213–I of 1960–61).

Select Committee. A Special Report from the Select Committee on Nationalised Industries has been published containing the observations of the British Transport Commission and of the Minister of Transport on the Report from the Select Committee on Nationalised Industries on British Railways (H.C. 254 of 1959–60) (H.C. 163 of 1960–61).

Parliament

Consolidation Bills

Land Compensation Bill. The First Report has been published of the Joint Committee of the House of Lords and of the House of Commons appointed to consider all Consolidation Bills (including Bills for consolidating Private Acts), Statute Law Revision Bills and Bills prepared pursuant to the Consolidation of Enactments (Procedure) Act, 1949. The Report is upon the Land Compensation Bill and includes the proceedings of the Committee and Minutes of Evidence (H.L. 26–I, 69–I, H.C. 191–I of 1960–61).

Factories Bill. The Second Report has been published of the Joint Committee of the House of Lords and of the House of Commons appointed to consider all Consolidation Bills. The Report is upon the Factories Bill and includes the proceedings of the Committee and Minutes of Evidence (H.L. 26–II, 71–I, H.C. 202–I of 1960–61).

Estimates Committee (House of Commons)

Reports. The Committee has published its Second Report (H.C. 168 of 1960–61) and its Third Report (Form of the Estimates) (H.C. 184 of 1960–61).

The Committee has also published its Eighth Special Report (Supplementary Estimates—Observations of the Treasury and Ministry of Works) (H.C. 210 of 1960–61) and its Ninth Special Report (Form of the Estimates—Observations of the Treasury and Comment of the Committee) (H.C. 211 of 1960–61).

On May 18, 1961, Mr. Charles Pannell raised with the Speaker the Second Report of the Committee which is on the House of Commons Library. The Speaker did not consider that there was any constitutional impropriety in the Committee considering the subject (640 H.C. Deb. 1554–1557).

House of Lords

Joint Select Committee. On April 26, 1961, the Secretary of State to the Home Department stated in the House of Commons that the Government had decided it was desirable that a Joint Select Committee of both Houses should be appointed to consider the composition of the House of Lords. The following terms of reference were suggested:

To consider, having regard among other things to the need to maintain an efficient Second Chamber,

(a) The composition of the House of Lords.

(b) Whether any and, if so, what changes should be made in the rights of peers and peeresses in their own right in regard to eligibility to sit in either House of Parliament and to vote at parliamentary elections; and whether any and, if so, what changes should be made in the law relating to the surrender of peerages.

(c) Whether it would be desirable to introduce the principle of remuneration for members of the House of Lords and, if so, subject to what conditions and to make recommendations (639 H.C. Deb. 420–432, 230 H.L. Deb. 873–882).

Members' Fund (House of Commons)

Exchequer Contribution. The House of Commons Members' Fund Order, 1961, authorises an increase from £10,000 to £22,000 of the maximum limit of the annual Exchequer contribution to the House of Commons Members' Fund (S.I. 1961 No. 988).

Resolution. On May 17, 1961, the House of Commons passed a resolution in pursuance of the House of Commons Members' Fund Act, 1948, s. 3, varying the maximum annual amounts of the periodical payments which may be made out of the Fund as from June 1, 1961. The principal changes are that, while the basis of grant for retired Members over the age of sixty with at least ten years' service continues to be not more than £500 as at present, the Trustees shall have the power at their discretion to give grants up to a maximum of £900 having regard to length of service and need; provision for widows and widowers being correspondingly increased. The annual subscription of Members is raised from £18 to £24 (S.I. 1961 No. 958; 640 H.C. Deb. 1508–1511).

Offices (House of Lords)

Report. The Third Report from the Select Committee has been published (H.L. (83) of 1960–61).

Parliamentary Commissioner

Debate. On May 19, 1961, the House of Commons debated the question of the appointment of a Parliamentary Commissioner for the purpose of considering cases of individual grievances referred to him, examining and investigating them, and with powers to report. The Government's view, expressed by the Solicitor-General, was that the rights of individuals as against the State are probably better safeguarded through the ambit of existing institutions and seeking to improve them (640 H.C. Deb. 1693–1756).

Privilege

Mr. Pargiter. On June 7, 1961, the Speaker ruled that no prima facie case of contempt or breach of privilege was raised by a complaint that Mr. George Pargiter in a Parliamentary Question had falsely asserted that an officer of the Attorney-General's Department had deliberately delayed a certain investigation in order to make it impossible to take legal action against a company (641 H.C. Deb. 1087–1091).

Viscounty of Stansgate. On April 12, 1961, Mr. W. A. Wilkins presented a petition to the House of Commons on behalf of electors in the constituency of Bristol, South-East, that Mr. Wedgwood Benn be permitted to continue to serve as their Member for so long as he may be elected (638 H.C. Deb. 215).

On April 13, 1961, the House of Commons rejected a motion that Mr. Wedgwood Benn be admitted to the House of Commons and heard in the debate on the report of the Committee of Privileges (638 H.C. Deb. 499–562). On the same day, the House of Commons debated the report and resolved to take note of the fact that on succession to the Viscounty Mr. Wedgwood Benn ceased to be a Member (638 H.C. Deb. 565–636).

On May 8, 1961, the Speaker made a statement that Mr. Wedgwood Benn, having come top of the poll at the by-election held in the constituency of Bristol, South-East, was seeking to be admitted to the House. The House of

Commons rejected a motion that he be admitted and resolved to take note that he ceased to be a Member on succession to the Viscounty of Stansgate, and that a new Writ was issued for electing a Member in his place, and ordered that he be not permitted to enter the Chamber unless the House otherwise ordered (640 H.C. Deb. 34–173).

On June 9, 1961, the Divisional Court (Gorman and McNair JJ.) ordered that the trial of the election petition concerning the Bristol South-East by-election should be heard in the High Court in London, and not in the constituency, substantially on the ground that the authorities to be cited in support of the issues would involve the examination of many records and reports which were not to be found in the ordinary law books (*The Times*, June 10, 1961).

Public Accounts Committee (House of Commons)

Report. The Second Report from the Committee (1960–61 Session) has been published on Virement between Votes of Service Departments (H.C. 220 of 1960-61).

Statutes

Royal Assent. The Post Office Act, 1961 (see above, p. 291), the National Health Service Contributions Act, 1961 (see above, p. 299) and the Sierra Leone Independence Act, 1961 (see below, p. 324), received the Royal Assent on March 28, 1961. The Lancashire Quarter Sessions Act, 1961 (see above, p. 289), the National Health Service Act, 1961 (see above, p. 299), and White Fish and Herring Industries Act, 1961 (see below, p. 310), received the Royal Assent on May 9, 1961. The Private Street Works Act, 1961 (see above, p. 292), the Home Safety Act, 1961 (see above, p. 294), and the Republic of South Africa (Temporary Provisions) Act, 1961 (see below, p. 326), received the Royal Assent on May 18, 1961.

The Department of Technical Co-operation Act, 1961 (above, p. 291), the Police Pensions Act, 1961 (see above, p. 297), the Rural Water Supplies and Sewerage Act, 1961 (see above, p. 298), and the Local Authorities (Expenditure on Special Purposes) (Scotland) Act, 1961 (see above, p. 298), received the Royal Assent on June 22, 1961.

See also NATIONALISED INDUSTRIES (above, p. 305), SUBORDINATE LEGISLATION (below, p. 310).

PUBLIC AUTHORITIES

Ancient Monuments Boards

Reports of the Ancient Monuments Boards for England, Wales and Scotland have been published (H.C. 216 of 1960–61).

Herring Industry Board

Report for 1960 has been published (Cmnd. 1366).

Historic Buildings Council

Reports for 1960 have been published for England, Wales and Scotland (H.C. 204, 205 and 206 of 1960–61).

Iron and Steel Board

Chairman. A Statement has been made by the Minister of Power of his determination, with the approval of the Treasury, that the remuneration payable to the Chairman (part-time) of the Iron and Steel Board shall be £6,000 a year as from July 1, 1961 (H.C. 219 of 1960–61).

Report of the Board for 1960 has been published (H.C. 214 of 1960–61).

Special Report of the Board on Development in the Iron and Steel Industry, 1961, has been published (H.C. 164 of 1960–61).

National Assistance Board

Report for 1960 has been published (Cmnd. 1410).

National Film Finance Corporation

Report and accounts for 1960–61 have been published (Cmnd. 1398).

New Towns

Commission. The Commission for the New Towns (Appointed Day) Order, 1961, appoints October 1, 1961, as the date on which the Commission for the New Towns is to come into being. This is the first step in carrying out the principal objects of the New Towns Act, 1959, which provides for the establishment of the Commission and for the transfer to it of the assets and properties of the new towns, now vested in the development corporations. Each corporation is to be wound up as it reaches the stage when its main task is substantially completed.

The order follows a statement made by the Minister last year, when he announced that the Commission would be set up towards the end of 1961, and that the first towns to be handed over would be Crawley and Hemel Hempstead in the spring of 1962 (S.I. 1961 No. 1162).

Royal Fine Art Commission

Report of the Commission (Chairman: Rt. Hon. Lord Bridges) for 1959–60 has been published (Cmnd. 1336).

White Fish Authority

New Act. The White Fish and Herring Industries Act, 1961 (9 & 10 Eliz. 2, c. 18), received the Royal Assent on May 9, 1961. This Act extends section 5 of the White Fish and Herring Industries Act, 1953 (1 & 2 Eliz. 2, c. 17), to enable grants to be made under a scheme irrespective of the size of vessel or the nature of the voyage or the waters in which fish have been caught (s. 1 (1)); section 1 (2) extends the power given by section 4 of the White Fish and Herring Industries Act, 1957 (5 & 6 Eliz. 2, c. 22), to increase by order the aggregate amount of white fish and herring subsidies, with the proviso that no single increase shall exceed £3m. Section 2 increases from £20m. to £25m. the amount of outstanding Exchequer advances to the White Fish Authority permitted under section 17 of the Sea Fish Industry Act, 1951 (14 & 15 Geo. 6, c. 30). Section 3, procedural provision as to payments; section 4, short title, etc.

The Act, which extends to Scotland, came into force on May 9, 1961.

Report and accounts for 1960–61 have been published (H.C. 234 of 1960–61).

See also Education (above, p. 290), Government Functions and Appointments (above, p. 290).

Scotland

See Education (above, p. 290), Government Functions and Appointments (above, p. 290), Local Government (above, p. 293), National Health Service (above, p. 299) and Town and Country Planning (below, p. 311).

Subordinate Legislation

Parliamentary Proceedings

Select Committee on Statutory Instruments. On April 13 and 25, May 9, and June 13 and 20, the Committee considered 36, 34, 40, 41, and 13 instruments respectively and resolved that it was unnecessary to draw the special attention of the House to them (H.C. 5–XIII, 5–XIV, 5–XV, 5–XVI, 5–XVII of 1960–61).

The Committee drew the special attention of the House to the Welfare Foods (Great Britain) Amendment Order, 1961 and to the Welfare Foods (Northern Ireland) (Amendment) Order, 1961, on the ground that their

purport called for elucidation (H.C. 5–XIII of 1960–61). The Committee requested the Minister of Transport to furnish the Committee with a memorandum explaining the Draft Special Roads (Classes of Traffic) Order, 1961 (H.C. 5–XVI of 1960–61).

Special Orders Committee (*House of Lords*). In the Eighth, Ninth and Tenth Reports the Committee examined thirteen instruments. The Committee found that two instruments raised important questions of policy and principle and required the special attention of the House, but that no further special inquiries were necessary before the House decided whether to approve them (H.L. (59) (78) (93) of 1960–61).

Town and Country Planning

Caravan Sites

Scotland. The Caravan Sites (Exemption from Licensing) (Scotland) Order, 1961, extends the scope of the exemption from site licensing contained in paragraph 3 of the First Schedule to the Caravan Sites and Control of Development Act, 1960, in the counties of Argyll, Caithness, Inverness, Orkney, Ross and Cromarty, Sutherland and Zetland (S.I. 1961 No. 976).

Compensation

Interest "accruing" on compensation payments under section 65 (3) of the Town and Country Planning Act, 1947, is not "accruing from day to day" within the meaning of section 2 of the Apportionment Act, 1870, and so is not to be apportioned under that Act.

Settled land was sold after the death of a tenant for life and thereupon the trustees of the settlement became entitled to compensation for loss of development value, including an interest element, part of which "accrued" under sections 14 (1) and 65 (3) of the Act of 1947, during the lifetime of the tenant for life. *Held,* that none of the income element of the compensation was payable to the estate of the dead tenant for life: *Re* Sneyd, Robertson-MacDonald *v.* Sneyd [1961] 1 W.L.R. 575; [1961] 1 All E.R. 744, Pennycuick J.

National Parks

Debate. On April 19, 1961, the House of Lords debated the National Parks (230 H.L. Deb. 604–623, 625–680).

Oxford Traffic Inquiry

Report. Sir Frederick Armer, who was appointed by the Minister of Housing and Local Government to conduct a public local inquiry into the provision of relief roads in Oxford, recommends in his report, dated May 18, 1961, that Oxford City Council's scheme for a road across Christ Church Meadow, farther south than the road proposed by Mr. Sandys in 1956, should be adopted in principle. The Minister has sent copies of the report for information to all the parties concerned. No decision has yet been taken by the Government on the report, in order that there may be opportunity for public discussion and debate before a decision is reached. Sir Frederick says that on weighing the evidence he has come to the conclusion with regret that, "if peace and quiet is to be restored to the central University area, a road across Christ Church Meadow is inescapable."

On June 26, 1961, the House of Lords debated the Report (232 H.L. Deb. 856–930).

Planning Permission

North Oxfordshire Ironstone Working. On May 9, 1961, the Minister of Housing and Local Government refused planning permission for opencast ironstone working from nearly 5,000 acres of land in north Oxfordshire. The land lies between Hook Norton, north-east of Chipping Norton on the west side, and the county boundary near East Adderbury, south of Banbury on the

east. Six applications for permission to win and work ironstone from 4,700 acres were made by Richard Thomas and Baldwins (Mineral Recovery) Ltd., and Messrs. Robert McGregor and Sons Ltd., applied for permission for opencast ironstone workings for about 112 acres. In common with all ironstone applications these proposals were referred to the Minister for decision, and public local inquiries were held last November.

In each case the Minister agreed with his inspector's conclusion that on the evidence presented no overriding need had been shown for the extraction of ironstone from the area. He accepted the inspector's recommendations and refused both applications.

See also LOCAL GOVERNMENT (above, p. 293), and TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, this page).

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

Council on Tribunals

Saffron Walden Planning Appeal Decision. On April 20, 1961, the Lord Chancellor, in a written answer, gave his opinion on the report he had received from the Council on Tribunals about the planning appeal of Major Aubrey Buxton and others relating to land in the Saffron Walden area (230 H.L. Deb. 740–744). On April 27, 1961, the Prime Minister, in an oral answer, made a statement in the House of Commons on the same matter (639 H.C. Deb. 622–625). On May 8, 1961, the House of Lords debated the subject (231 H.L. Deb. 35–76). On May 16, 1961, the House of Commons debated the subject on a motion for the adjournment (640 H.C. Deb. 1333–1344). On May 24, 1961, the Council on Tribunals issued a statement that it considered the difficult question of fresh advice of evidence which Ministers ought properly to take into account after inquiries, urgently required more study and that some general guidance about it should be published both for the information of the public and for the assistance of Government departments. The Council intends to make a report to the Lord Chancellor on the whole problem of handling new factual evidence and on the application of the principles laid down in the report of the Franks Committee.

Departmental Inquiries and the Sub Judice Rule

Debate. On April 25, 1961, the House of Lords debated the practice which restricts debate on matters which are *sub judice* in the courts and the application of that practice to debate on the proceedings of a Departmental Inquiry (230 H.L. Deb. 780–806).

Disciplinary Bodies

General Nursing Council. The Nurses (Amendment) Act, 1961 (9 & 10 Eliz. 2, c. 15), received the Royal Assent on March 28, 1961. This Act amends the Nurses Act, 1957 (5 & 6 Eliz. 2, c. 15), and the Nurses (Scotland) Act, 1951 (14 & 15 Geo. 6, c. 55), in relation to the enrolment and training of nurses, membership of the General Nursing Council and disciplinary proceedings.

Sections 4–8 make additional provision relating to membership of the General Nursing Council in England and Wales and the corresponding Council in Scotland and their respective committees; section 9 provides for attendance of witnesses and the administration of oaths in disciplinary proceedings; section 10 makes provision for the appointment of an assessor to advise on questions of law arising in cases relating to removal of a person from the register or the roll of nurses for disciplinary reasons.

The Act and the Nurses Act, 1957 (5 & 6 Eliz. 2, c. 15), may be cited together as the Nurses Acts, 1957 and 1961, and the Act and the Nurses (Scotland) Act, 1951 (14 & 15 Geo. 6, c. 55), may be cited together as the Nurses (Scotland) Acts, 1951 and 1961.

The Act, which extends to Scotland, but not (save for sections 9 (2) (3), 13) to Northern Ireland, came into force on June 29, 1961, three months after the date on which it received the Royal Assent.

Patents Appeal Tribunal

The Patents Appeal Tribunal (Amendment) Rules, 1961, insert in the Patents Appeal Tribunal Rules, 1950, a provision requiring a respondent to give notice of any intention on his part to support the decision appealed against on new grounds. They also make a minor correction in rule 1 of the 1950 Rules (S.I. 1961 No. 1016).

Wales

Water Resources

Report. The Report has been published of the Welsh Advisory Water Committee (Chairman: Alderman Lloyd O. Owen, J.P.) on the Water Resources of Wales (Cmnd. 1331).

Wireless and Television

Independent Television Authority

Account has been published of the sums issued to the Postmaster-General out of the Consolidated Fund and of sums received by him and paid into the Exchequer, 1959–60, in respect of advances to the I.T.A., together with the Report of the Comptroller and Auditor-General thereon (H.C. 187 of 1960–61).

COMMONWEALTH AND INDEPENDENT TERRITORIES

General

Colonial Development Corporation

Financial Structure. On April 27, 1961, the Secretary of State for the Colonies made a statement in the House of Commons, in answer to an oral question on changes in the financial structure of the Colonial Development Corporation. In framing the new arrangements, he said that he and the Chancellor of the Exchequer had been greatly helped by the analysis and recommendations in the report of the committee under the chairmanship of Lord Sinclair of Cleeve (Cmnd. 786). The statement is as follows:

"In the past, the true financial position of the corporation has been greatly obscured by the arrangements whereby, in recognition of the fact that some of the corporation's projects do not immediately become revenue-bearing, it does not have to service long-term Exchequer advances during the first seven years after they are made. The accumulation of unpaid interest which has thus arisen amounts to about £11 million.

"In order to ease the financial position of the corporation, it has been decided to release it from the obligation to meet this liability when it becomes due, and to place the sum into a special account, in a way similar to that proposed by the Sinclair Committee, where interest will not be payable. We shall also place in this account the corporation's debt—about £9 million—arising from the Exchequer advances for projects which have been wholly abandoned by the corporation.

"Towards payment of both liabilities in the special account—up to a total of £20 million in all—the corporation will pay over to the Exchequer 60 per cent. of its net annual profits in excess of £250,000. These profit-sharing arrangements are designed to relate the corporation's payments more closely to its financial capacities from time to time. These are, however, novel arrangements, and we propose to review them in three years' time in the light of experience gained.

"The terms attaching to future advances by the Exchequer will depend on whether the corporation requires them for making loans to third parties or for investment in equity-type holdings. In the case of loan transactions, the period over which repayments to the Exchequer will be made will be such as to

conform generally to that of the capital repayments which the corporation will be receiving from third parties. In the case of investments in shares, the corporation will generally draw long-term advances for a 40-year period, and, for this type of investment only, the seven-year grace period will continue to be applicable.

"I am satisfied that these arrangements will be of real assistance to the corporation in the important and difficult task in which it is engaged. The corporation, for its part, would have preferred the adoption of the Sinclair Committee's recommendations, whereby a part of the Exchequer advances would have been converted into equity capital. All the same, it considers that these changes will provide a sounder, stronger and more realistic basis for its future operations. To this result, the corporation has made its contribution by accepting a restriction of the type of project to which the seven-year grace period will now apply. I should also like to acknowledge the help and co-operation it has given me over a prolonged period of consultation." (639 H.C. Deb. 627–631; Commonwealth Survey, C.O.I., May 5, 1961.)

Report and Accounts for 1960 have been published (H.C. 199 of 1960–61). On June 27, 1961, the House of Lords debated the Report and Accounts (232 H.L. Deb. 979–1016).

Colonial Territories

Report. The Report on the Colonial Territories, 1960–61, has been published (Cmnd. 1407). The following are some of the main points made in the Report on Constitutional Affairs (pages 5–45):

During the year covered by this Report (April 1960–March 1961) three territories became independent: the Somaliland Protectorate, Cyprus and the Federation of Nigeria; the independence of a fourth territory, Sierra Leone, in April 1961, has for convenience also been included in this Report.

Plebiscites were held in the Northern and Southern Cameroons in February to decide the future of the territories. The Northern Cameroons voted in favour of joining the Federation of Nigeria, and the Southern Cameroons in favour of the Cameroun Republic. The General Assembly agreed to the termination of the Trusteeship Agreements. The Northern Cameroons joined the Federation of Nigeria on June 1, 1961, and the Southern Cameroons will join the Cameroun Republic on October 1, 1961.

In the Gambia, elections under the new constitution were held in May, and six elected members of the House of Representatives were appointed Ministers, one of whom was named Chief Minister in March 1961.

Following Tanganyika's second general election in August the Council of Ministers was reconstituted to include a majority of unofficial Ministers, one of whom was appointed Chief Minister. A conference held in Dar es Salaam in March agreed on the final stages of constitutional development leading to independence on December 28, 1961. Meanwhile Tanganyika became internally self-governing on May 1, 1961, and now has a cabinet headed by a Prime Minister. A resolution proposing the termination of the Trusteeship Agreement was adopted by the General Assembly in April 1961.

Details of a new constitution for Uganda were set out in a published despatch from the Secretary of State to the Governor in September. In March elections were held on a common roll for a Legislative Council with an elected majority. Meanwhile a Relationships Commission had been appointed to consider the form of government best suited to an independent Uganda. (The Report of the Commission was published on June 20, 1961.)

In Kenya, elections under the new constitution took place in three phases between January and March: primary elections to select candidates for the common roll elections, the common roll elections, and the election by the constituency members of twelve national members.

The main recommendations of the Constitutional Commissioner for Zanzibar, including the introduction of a ministerial system, were accepted as the basis for the United Kingdom's proposals for a new constitution. Elections

for the new Legislative Council were held in January but as neither of the political groups were able to muster a majority in the Legislative Council a caretaker government was formed pending fresh elections in June.

The conference to review the constitution of the Federation of Rhodesia and Nyasaland adjourned pending the outcome of talks to be held on the constitutions of Northern Rhodesia and Southern Rhodesia. Constitutional advance in Northern Rhodesia was considered at a conference in London in December. The views of the various political parties in Northern Rhodesia were very far apart and when the conference resumed in January the United Federal Party and the Dominion Party representatives did not attend. The Secretary of State put forward a plan and the Governor was asked to work out details within its framework in consultation with the political groups in Northern Rhodesia, and then to put forward his recommendations to the Secretary of State. The state of emergency in Nyasaland was ended in June and the remaining people held in detention were released in September. A new constitution for Nyasaland, drawn up at a conference in London in July-August, provides for additional unofficial Ministers in the Executive Council and additional elected members in the Legislative Council, to be elected on an extended franchise.

The Federation of the West Indies became internally self-governing on August 3. The Inter-Governmental Conference reconvened in Trinidad on May 2, 1961, to consider the final reports of the two committees it had set up in September 1959. The Constitutional Conference, which it is hoped will result in a date being set for the independence of the Federation, opened in London at the end of May 1961.

In British Guiana preparations have continued for the election to be held under the new constitution in August 1961. In British Honduras the new constitution was brought into force and a general election was held in March.

Recommendations made by a Constitutional Commission under Sir Hilary Blood were accepted by Her Majesty's Government as the basis of a new constitution for Malta, and it is hoped to hold elections before the end of 1961.

In Aden Colony, Members in Charge assumed additional departmental responsibilities and subsequently the title of Ministers.

The Governor of Fiji announced plans for giving unofficial members of the Executive Council supervisory functions over groups of Government Departments.

In the British Solomon Islands Protectorate a Legislative Council and an Executive Council replaced the former Advisory Council.

Common Market and the Commonwealth

Debate. On June 21, 1961, the House of Lords debated the Commonwealth and the European Common Market (232 H.L. Deb. 612–708).

Privy Council

Jurisdiction. In DENNIS HOTELS PTY. *v.* STATE OF VICTORIA; WHITEHOUSE *v.* STATE OF QUEENSLAND (May 1, 1961) two appeals from the Full Court of the High Court of Australia raised the question whether certain licence fees imposed by Acts of the states of Victoria and Queensland were invalid by section 90 of the Constitution of the Commonwealth. The preliminary point was taken that the questions were as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the states, and that, in the absence of a certificate of the High Court, under section 74 of the Constitution, the Judicial Committee had no jurisdiction to entertain the appeals. The Judicial Committee (Lords Simonds, Reid, Radcliffe, Tucker and Hodson) *held* that the appeals were incompetent (D.C.) See also *The Times*, May 2, 1961.

ADEN

Colonial Report

The Report for 1957 and 1958 has been published by the Colonial Office (H.M.S.O. 58-1-1-58).

BARBADOS

Additional Instructions

Additional Instructions, dated April 27, 1961, issued to the Governor of Barbados, amend the Royal Instructions issued in 1914.

Letters Patent

The Barbados Letters Patent, 1961, dated April 27, 1961, amend the Barbados Letters Patent, 1914.

See also WEST INDIES (below, p. 328).

BECHUANALAND

Legislative Council

On June 22, 1961, in a written answer, the Secretary of State for Commonwealth Relations said that, following the new constitution, providing *inter alia* for an elected unofficial majority with equal numbers of European and African members, promulgated in the Bechuanaland Protectorate (Constitution) Order in Council, 1960 (S.I. 1960 No. 2416), voting took place in May 1961. The first Legislative Council of the Bechuanaland Protectorate was opened at Lobatsi on June 20, 1961 (642 H.C. Deb. 157–8).

CAMEROONS

Colonial Report

The Report for 1958 has been published by the Colonial Office (H.M.S.O. 58–1–34–59).

Northern Cameroons

The Northern Cameroons (Administration) (Amendment) Order in Council, 1961, has been made.

In accordance with decisions taken by the General Assembly of the United Nations, Her Majesty's Government in the United Kingdom will cease to be responsible for the administration of the Northern Cameroons on June 1, 1961, and responsibility for the territory will be assumed by Her Majesty's Government of the Federation of Nigeria. This Order amends the Northern Cameroons (Administration) Order in Council, 1960, so as to permit the Nigerian authorities to act thereunder (S.I. 1961 No. 998).

Southern Cameroons

Constitutional Amendment. The Southern Cameroons (Constitution) (Amendment) Order in Council, 1961, amends the Southern Cameroons (Constitution) Order in Council, 1960, to increase the number of Elected Members of the House of Assembly, and the maximum number of Ministers and Parliamentary Secretaries (S.I. 1961 No. 997).

Negotiations with the Cameroun Republic. On May 12, 1961, the Colonial Secretary, in a written answer, said that the Commissioner of the Cameroons, the Premier of the Southern Cameroons, and the Minister of Commerce and Industries had just completed discussions with himself in London. They were returning to the Southern Cameroons after attending the General Assembly of the United Nations in New York.

The steps to be taken following the passage of the recent United Nations Resolution endorsing the results of the Plebiscites, were reviewed and the Premier of the Southern Cameroons expressed the intention to resume his contacts with the Government of the Cameroun Republic as soon as possible, as a preliminary to the consultations between the Administering Authority and the Governments of the Republic and of the Southern Cameroons which were contemplated in the Resolution.

The motions on constitutional matters recently passed in the House of Assembly of the Southern Cameroons were discussed. It was agreed that in future the Premier should increasingly preside in the Executive Council and that the Deputy Commissioner and Financial Secretary should cease to be

members of the Council and of the House of Assembly. It was agreed that a Minister of Finance should be appointed.

It was also agreed that the number of constituencies should be increased to thirty-seven. This would, of course, not take effect until the next general election. In addition, it was decided that the limit on the number of Ministers should be raised and it was noted that discussions had already taken place between the leaders of the Government and the Opposition with a view to establishing national co-operation at this important time in the life of the country. It was agreed, in principle, that the House of Chiefs should have legislative powers but that these should not come into effect until October 1, 1961. The question of changes in electoral qualifications was left for later consideration. The opportunity was taken for an exchange of views on the many practical problems which will require attention in the coming months (640 H.C. Deb. 85–86).

On June 6, 1961, in an oral answer, the Under-Secretary of State for the Colonies said the Premier of the Southern Cameroons and the President of the Cameroun Republic had discussions from May 22 to 24. At this meeting they confirmed that reunification of their two countries should be on the basis of a Federation. The United Kingdom Trusteeship ends on October 1, 1961 (641 H.C. Deb. 875–876).

United Nations

The Government submitted a Report for 1959 to the General Assembly of the United Nations on the Cameroons under United Kingdom Administration (H.M.S.O. 58–250).

East Africa High Commission

Future of the Commission

Discussions on the future of the East Africa High Commission were held in London from June 19 to 27, 1961, with the Secretary of State for the Colonies presiding.

The talks were attended by delegates from the United Kingdom, Tanganyika, Kenya, Uganda and the East Africa High Commission and an observer from Zanzibar. A report setting out in detail the result of the discussions will be issued as a White Paper very shortly.

These talks follow on from the Constitutional Conference held in Dar es Salaam in March, which was attended by delegates from the Government of Tanganyika and the Government of the United Kingdom. The Government of Tanganyika then expressed its desire to continue participation in the common services provided by the East Africa High Commission. It was agreed that consideration should be given to ways in which this could be done in a manner compatible with Tanganyika's sovereignty after attaining independence on December 28, 1961; and that further discussions on these topics should take place in London in the second half of June.

As a result of the London discussion, it has been agreed that it would be in the interests of all the territories to ensure that common services at present provided by the East Africa High Commission should continue to be provided on an East African basis; and that when Tanganyika becomes independent a new Organisation should be set up for this purpose. Tanganyika, Kenya and Uganda will participate as equal partners in the control of the new Organisation, which will be known as the East African Common Services Organisation. Responsibility for the Organisation will rest with a group of three Ministers, which will be entitled the East African Common Services Authority. They will be the principal elected Ministers of the three territories. The Authority will be supported by four groups each composed of three Ministers, one from each territory. Each group will deal with a specified field of subjects and be responsible for formulating policy within that field. These four fields of responsibility will be Communications; Finance; Commercial and Industrial Co-ordination; Social and Research Services.

There will be a Central Legislative Assembly consisting of the twelve Ministers who make up the membership of the four groups, nine members from each territory elected by the territorial legislature and the Secretary-General and the Legal Secretary of the Organisation. The matters with respect to which the Assembly will have the power to pass measures are set out in the Report. The new arrangements will in due course be embodied in an Agreement to be entered into shortly after Tanganyika becomes independent.

The delegates agreed that services of the new Organisation could be provided for Zanzibar on an agency basis if the Government of Zanzibar so requested; and that if the Government of Zanzibar wished to participate fully in the new Organisation, their Governments would be pleased to consider, in consultation with the Government of Zanzibar, the basis on which such participation might be arranged.

Legislative Council

The East Africa (High Commission) (Temporary Provisions) Order in Council, 1961, temporarily extends the term of office of the Unofficial Members of the East Africa Central Legislative Assembly elected by the Legislative Council of Kenya (S.I. 1961 No. 737).

Fiji

Constitutional Changes

Proposals for constitutional changes in Fiji were outlined in a government statement issued in Suva on February 28, 1961. The changes will be implemented in two stages. In the first stage, unofficial members of the Executive Council will undertake supervisory functions over groups of government departments. This will be a preliminary to the second stage—the introduction of a full ministerial system under which unofficials would have executive responsibility. The government statement emphasised that the proposals were in broad outline only and might well need modification in the light of public discussion.

The statement described the first stage as a preliminary one to give unofficials experience of working the ministerial system and to give the civil service experience of working with ministers. The second stage would be for a full ministerial system with executive responsibility, in which ministers would have full responsibility for one or more departments. The Government would retain the present *ex-officio* posts of Colonial Secretary, Attorney-General and Financial Secretary and they would rank as ministers. The number of ministers from the unofficial side could be either five or six. The purpose of the proposals was to associate the people of Fiji more closely not only with the legislature but with the executive in its day-to-day functions. "It is considered that the time has come when the government of the colony should be slowly transferred from the hands of senior civil servants to the representatives of the people. The object is to ensure that this process is undertaken in an orderly manner and in a manner which places true responsibility upon the elected representatives of the people" (Commonwealth Survey, C.O.I., April 11, 1961).

Gambia

Colonial Report

The Report for 1958 and 1959 has been published by the Colonial Office (H.M.S.O. 58–1–16–59).

Constitutional Talks

On June 20, 1961, in a written answer, the Colonial Secretary said that the adjourned constitutional talks would be resumed in London on July 24, 1961 (642 H.C. Deb. 120).

Courts

Court of Appeal. The Gambia Court of Appeal Order in Council, 1961, has been made.

The purpose of this Order is to constitute a Court of Appeal for the Gambia to exercise the powers of an appellate court in relation to that territory which formerly were exercised by the Sierra Leone and the Gambia Court of Appeal (S.I. 1961 No. 743).

Disciplinary Power of Judges. The common law power of a judge to strike off or suspend a legal practitioner, restated in relation to the Gambia by the Rules of the Supreme Court of the Gambia, Ord. IX, r. 7, is a judicial power for the purpose of section 7 of the Supreme Court Ordinance of the Gambia and accordingly can be exercised by a deputy judge appointed under that section.

Per curiam: "A judge exercises judicial powers, not only when he is deciding suits between parties, but also when he exercises disciplinary powers which are properly appurtenant to the office of a judge."

A practitioner was struck off the roll of the Supreme Court of the Gambia by order of a deputy judge. The appeal as to (among other things) jurisdiction, *held* that the deputy judge had jurisdiction to make the order: ATT.-GEN. OF THE GAMBIA *v.* N'JIE [1961] 2 W.L.R. 845; [1961] 2 All E.R. 504 (P.C.).

Privy Council

The Gambia (Appeals to Privy Council) Order in Council, 1961, makes provision for appeals from the Gambia Court of Appeal to the Judicial Committee of the Privy Council (S.I. 1961 No. 744).

GIBRALTAR

Colonial Report

The Report for 1959 has been published by the Colonial Office (H.M.S.O. 58–1–17–59).

HONG KONG

Colonial Report

The Report for 1960 has been published by the Colonial Office (H.M.S.O. 58–1–21–60).

JAMAICA

Constitution

The Jamaica (Constitution) (Amendment) Order in Council, 1961, has been made.

The purpose of this Order is to amend section 39 of the Jamaica (Constitution) Order in Council, 1959, so that it applies not only to stock which has been made trustee stock under the Colonial Stock Act, 1900, but also to other stock which may in the future be issued on condition that section 39 shall apply to it (S.I. 1961 No. 571).

See also WEST INDIES (below, p. 328).

KENYA

See EAST AFRICA HIGH COMMISSION (above, p. 317).

MALTA

Blood Commission

Debate. On June 28, 1961, the House of Lords debated the Report of the Blood Commission (Cmnd. 1261), which formulated proposals for a new constitution for Malta (232 H.L. Deb. 1018–1058).

MAURITIUS

Constitutional Review

The Colonial Secretary presided at talks which opened in London on June 26, 1961, to review the Constitution of Mauritius.

The holding of these talks follows an undertaking given by Mr. Macleod, during his visit to Mauritius shortly after the cyclones which devastated the island early in 1960, when he said it would be right to hold discussions in 1961 to plan the next stage of political development.

Nigeria

Colonial Report

The Report for 1957 has been published by the Colonial Office (H.M.S.O. 58–1–30–57).

Rhodesia

Northern Rhodesia

Barotseland. On April 22, 1961, the Colonial Office issued a statement regarding the talks which had just been concluded between the Secretary of State for the Colonies and the Paramount Chief of Barotseland and the delegation accompanying him. In response to anxieties which the Barotseland Delegation expressed about the future status of Barotseland, Mr. Macleod assured the Paramount Chief that the special position of Barotseland would not be affected by the constitutional changes for Northern Rhodesia, which are at present under consideration, and renewed the undertakings already given that no constitutional change affecting Barotseland would be made without consultation with, and the consent of, the Paramount Chief and Council.

The Secretary of State also indicated his readiness to advise the Queen to make certain amendments of the provisions in the relevant Orders in Council in order to clarify and put beyond doubt existing Barotse rights.

The statement went on to say that the Paramount Chief would communicate the assurances given to the delegation to his people on his return to his country. In the course of the Governor's current talks on the constitution of Northern Rhodesia, further discussions would take place with the Paramount Chief and Council on the representation of Barotseland in the Legislative Council.

It was also agreed during the discussions in London that the Paramount Chief should in future be officially known and referred to by the title which is used by the people of Barotseland themselves, namely, the Litunga of Barotseland Protectorate.

The Barotseland Protectorate lies in the west of Northern Rhodesia. Its special position rests on the Lewanika Concession (or Treaty) of 1900 by which the status of Barotseland differs from that of the rest of Northern Rhodesia; this special position is defined in the constitutions of the Federation of Rhodesia and Nyasaland and of Northern Rhodesia. The Monckton Commission on Central Africa drew attention to the fact that "for the past sixty years the desire of the Barotse people to remain securely under the direct protection of the British Crown without the interpolation of any intermediaries has been clear and consistent," and that this was still the case; the commission pointed to the need for consultation between the Paramount Chief and the Governments concerned regarding the future status of Barotseland and its relationship with the Governments of the United Kingdom, the Federation and Northern Rhodesia.

Constitutional Change. The Colonial Office has published as a White Paper: Proposals for Constitutional Change (Cmnd. 1423), containing the Governor's recommendations on matters remitted to him by the White Paper (Cmnd. 1295) of February, 1961, which contained the Government's proposals for a revision of the Constitution of Northern Rhodesia. The proposals consider the precise number of elected members who should sit in the Legislative Council and the delimitation of the constituencies from which they should be returned, the way in which members should be returned in "national" constituencies, and the revised qualifications for the franchise.

On June 26, 1961, the Colonial Secretary made a statement in the House of Commons summarising the Governor's main recommendations and the Government's attitude towards them. The Colonial Secretary indicated that the recommendations were in the main acceptable to the Government but that certain amendments should be made to them (643 H.C. Deb. 33–41; 232 H.L. Deb. 830–835).

Judges' Salaries. The Northern Rhodesia Order in Council, 1961, amends the provisions of the Northern Rhodesia Orders in Council, 1924 to 1960, relating to concurrent appointments and judges' salaries (S.I. 1961 No. 996).

Southern Rhodesia

Constitution. White Papers have been published on the proposed Southern Rhodesia Constitution. Part I contains a Summary of Proposed Changes (Cmnd. 1399) and Part II Detailed Provisions (Cmnd. 1400).

The White Papers incorporate the new constitution which was agreed in outline at the conference in Salisbury in February under the chairmanship of the Secretary of State for Commonwealth Relations. The safeguards are a Declaration of Rights and a Constitutional Council, with the task of examining legislation and advising whether it is in conformity with the Declaration of Rights.

The Southern Rhodesia Government intends to submit the proposals to a referendum of the existing electorate in Southern Rhodesia; Sir Edgar Whitehead, the Prime Minister, has announced that this will take place on July 26. If the constitution is approved it will be brought into force by stages, beginning with the introduction of a Bill in the United Kingdom Parliament authorising the Queen to grant a new constitution to Southern Rhodesia by Order in Council.

Discussing the Declaration of Rights, the White Papers state that it "will state first of all the fundamental rights and freedoms to be enjoyed by the people of Southern Rhodesia. Such rights will apply without distinction of race, colour or creed and the Declaration of Rights will contain a number of clauses which will afford protection against the infringement of the fundamental rights and freedoms either by the Legislature, the Executive, corporate bodies or by private persons. Special provisions for the enforcement of these rights and freedoms in the courts with an ultimate appeal to the Judicial Committee of the Privy Council will be included.

"Any law, regulation, by-law, or other subsidiary legislation, passed after the enactment of the new constitution, will be invalid if it contravenes the provisions of the Declaration of Rights, and it will be open to any person claiming to be adversely affected by any such law to question its validity in the High Court of Southern Rhodesia."

The rights in the declaration include: protection of rights to life and personal liberty, from slavery and forced labour, inhuman treatment, deprivation of property and for privacy of the home; provisions to secure protection of the law, protection of freedom of conscience, freedom of expression, freedom of assembly and association, protection from discrimination by written laws, and from discriminatory action. There are the usual saving clauses providing that nothing is inconsistent with these rights which is done in the interests of defence, public order, public safety, public morality and public health.

Provision is included, in a section on enforcement of the Declaration of Rights, for application to the High Court, with appeal to Her Majesty in Council, provided that this shall not apply "during any period during which the federal constitution provides for an appeal from any determination of the High Court under this section to the Federal Supreme Court." It is also stated, however, that "The Federal Government have . . . undertaken that, before the new constitution . . . comes into effect, they will invite the Federal Assembly to provide that, in cases relating to the interpretation of the Declaration of Rights, there shall be an unqualified right of appeal from the Federal Supreme Court to the Judicial Committee of the Privy Council."

The Constitutional Council will consist of a chairman and eleven members. The chairman will be of high legal standing, appointed by the Governor on the advice of the Chief Justice in consultation with the puisne judges. The members will include at least two Europeans, two Africans, one Asian, one Coloured person, and two persons with legal qualifications and experience, and all members must be federal citizens.

For the election of the first members of the Constitutional Council there will be convened a special body composed of judges and retired judges of the High Court, and the president of the Council of Chiefs, with the Chief Justice acting as chairman. The members of the council will be elected by a two-thirds majority of those voting from a list of candidates which will be submitted jointly by the Governments of the United Kingdom and Southern Rhodesia. Thereafter the members of the Constitutional Council will be elected by an electoral college composed on similar lines but of which the chairman will be the chairman of the Constitutional Council.

" It will be the duty of the Constitutional Council to examine any Bill (other than a Money Bill) passed by the Legislative Assembly before it is submitted to the Governor for Assent." If, within thirty days, the council report that in their opinion the Bill contravenes the provisions of the Declaration of Rights, the Legislative Assembly will consider whether to withdraw the Bill or amend it.

" The Legislative Assembly will be entitled to resolve by a two-thirds majority or, after a delay of six months, by a simple majority, of the total membership of the assembly, that, notwithstanding an adverse opinion of the council, the Bill should be presented to the Governor for his assent."

There is also provision for the passing of a Bill without waiting for a report from the council if it receives a " certificate of urgency " from the Government. In such a case the law would subsequently be examined by the council and in the event of an adverse opinion " it will be for the Legislative Assembly to decide whether to repeal or amend it or to face the possibility of its validity being challenged in the courts." The council will also examine similarly all new rules and regulations.

" For the avoidance of misunderstanding," one of the White Papers continues, " it should be emphasised that . . . any law which in the opinion of the courts contravenes the provisions of the Declaration of Rights, may be declared by the courts to be invalid, whether or not an adverse report has been made upon it by the Constitutional Council."

Where the assembly has passed or confirmed legislation in spite of an adverse report, " it will be open to any person who considers that law contravenes the Declaration of Rights . . . to apply to the council for a legal aid certificate for the purpose of taking the matter to the courts. . . . If the Constitutional Council considers the case to be a suitable one for testing the validity of the law in question, the council will be empowered to give such a certificate, which will entitle the person concerned to receive out of public funds such costs . . . as . . . have been reasonably incurred."

" The Declaration of Rights and the procedure described above will not apply to any laws or subsidiary legislation in force at the time of the enactment of the constitution. But the Constitutional Council will have the right to draw the attention of the Legislative Assembly to any such law . . . which, in their opinion, is inconsistent with the provisions of the Declaration of Rights."

The White Papers provide for a Legislative Assembly of sixty-five members elected by voters on two rolls. The franchise details follow those published after the February conference.

The Queen will continue to be represented in Southern Rhodesia by a Governor, appointed by the Queen on the advice of the United Kingdom Government. But the latter will in future be required to consult the Prime Minister of Southern Rhodesia before advising the Queen.

The Governor will act in all matters on the advice of his Ministers except regard to:

(a) the dissolution of the Legislative Assembly;
(b) the choice of the Prime Minister; and
(c) the appointment of the chairman of the Constitutional Council, where he will be required to act on the advice of the Chief Justice.

In regard to the matters mentioned in (a) and (b) above he will, as hitherto, be required to act as far as possible in accordance with the constitutional conventions governing the exercise of similar functions by the Sovereign in the United Kingdom.

The present executive council will be known in future as the "Governor's Council," and the maximum number of Ministers will be increased from seven to twelve. In addition, provision will be made for the appointment of Parliamentary Secretaries.

A new subject covered in the two White Papers is land tenure. "The existing Native Reserves and the Special Native Area will together be placed in one category to be described as "Tribal Trust Land" for occupation by tribesmen on a basis of communal tenure. To this will be added any land which may subsequently be assigned for the purpose."

A Board of Trustees will be established in which will be vested all tribal trust land "for the exclusive use and occupation of the tribesmen in communal tenure according to tribal law and custom."

When they consider it to be in the public interest, the board will be empowered to exchange trust land for Crown Land elsewhere on terms and conditions to be agreed with the Southern Rhodesia Government.

"Such conditions will have to include the payment of compensation to tribesmen for disturbance and for permanent improvements made by them on land from which they may be displaced."

Similarly, provision is made for the declaration of land to be no longer trust land if it is required for mineral development, defence, improvement of communications, or other public purposes. Again, other land and compensation must be given in exchange.

"With the agreement of the board, townships, villages, or business centres may be established on Tribal Trust Land for use and occupation by tribesmen, and, in such cases, land in the area will be made available for purchase by Africans.

"Provision will be made for converting Tribal Trust Land to individual freehold ownership if the Board of Trustees are satisfied that this is the wish of the tribesmen concerned, and is in the general interests of the community."

Under the new proposals Southern Rhodesia, which has not hitherto been able to amend its constitution without the approval of the United Kingdom Government, will be able to do so, with the exception of amendments which would affect: "(a) the position of the Sovereign and the Governor; (b) the right of the United Kingdom Government to safeguard the position regarding: (i) international obligations; (ii) undertakings given by the Government of Southern Rhodesia in respect of loans under the Colonial Stock Acts."

One of the White Papers states: "with the exception of certain basic clauses the Legislative Assembly will be empowered to amend any other section of the constitution by a two-thirds majority of its total membership." The basic clauses are those relating to the Declaration of Rights, appeals to the Privy Council, the Constitutional Council, the judiciary, amendments to the franchise qualifications which would restrict them (but not those which would widen them), ownership of African land and racial restrictions on it, the security of Civil Service pensions, and the provisions governing the amendment of the constitution itself.

For the amendment of these basic clauses "it will be necessary, in addition to the two-thirds majority of the assembly, to obtain the agreement of each of the four principal racial communities (*i.e.*, European, African, Asian and Coloured). Each community will reach its decision by a simple majority of votes in a separate referendum. All registered voters will be entitled to vote, but until there are 50,000 Africans registered as voters, Africans over twenty-one years of age, who have completed a course of primary education of prescribed standard, will be entitled to vote in the African referendum.

"Alternatively, if it so decides by a two-thirds majority, the Legislative

Assembly may, instead of referring the issue to a referendum, seek the approval of the United Kingdom Government for the constitutional changes they desire. The United Kingdom Government will, however, be at liberty to decline to give a decision, if they consider that it would be more appropriate for the issue to be decided by a referendum " (Commonwealth Survey, C.O.I., June 20, 1961).

On June 22, 1961, the House of Commons debated the proposals for the revision of the Constitution of Southern Rhodesia (642 H.C. Deb. 1696–1816).

Sierra Leone

Independence

The Sierra Leone Independence Act, 1961 (9 & 10 Eliz. 2, c. 16), received the Royal Assent on March 28, 1961. By this Act, Sierra Leone achieved independent nationhood and became a Member of the Commonwealth on April 27, 1961.

The Sierra Leone (Constitution) Order in Council, 1961, makes provision for a new Constitution for Sierra Leone with effect from that date, including provision for an Executive Government, a legislature, a Supreme Court, a Court of Appeal and Judicial and Public Service Commissions. The Constitution also contains provisions regarding citizenship of Sierra Leone and fundamental rights of the individual (S.I. 1961 No. 741).

Provision is made for the existing House of Representatives, apart from the two nominated members, to continue in being until the first dissolution of Parliament, due to take place not later than July 1, 1962. In this interim period the House will thus consist of a Speaker and fifty-one elected members (thirty-nine directly elected and twelve Paramount Chiefs elected by the twelve District Councils in the Provinces).

The constitution provides for the creation of a Sierra Leone citizenship with effect from Independence Day. Subject to certain provisos, it confers citizenship on everyone who, having been born in the former colony or protectorate of Sierra Leone, was on April 26, 1961, a citizen of the United Kingdom and Colonies or a British protected person; on everyone born in Sierra Leone after April 26, 1961; and on persons born outside Sierra Leone after April 26, 1961, whose father is a citizen of Sierra Leone. Provision is also made for the aquisition of Sierra Leone citizenship by registration. A citizen of Sierra Leone, by virtue of that citizenship, also has the status of Commonwealth citizen.

The constitution recognises that every person in Sierra Leone, whatever his race, tribe, place of origin, political opinions, colour, creed or sex, is entitled, subject to respect for the rights and freedoms of others and for the public interest, to the following fundamental rights and freedoms: life, liberty, freedom of movement, security of the person, the enjoyment of property and the protection of the law; freedom of conscience, of expression and of assembly and association, and respect for his private and family life. Provision is made for the protection of such rights.

The constitution provides for the establishment of the office of Governor-General, who is appointed by the Queen as Her Majesty's representative in Sierra Leone.

Legislative power is vested in a Parliament, which consists of the Queen and a House of Representatives. After the next general election, due to be held in 1962, the House will consist of a Speaker and not less than sixty members elected by secret ballot. Apart from one Paramount Chief for each District, the elected members will be elected from one-member constituencies to be drawn up by an Electoral Commission. Members of the House must be citizens not less than twenty-five years old who are sufficiently proficient in the English language to be able to take an active part in the proceedings of the House, which will be conducted in English. The Speaker will be elected by members of the House from among their number or from persons qualified to be elected as such. A Deputy Speaker will be elected from among the members of the House. An Electoral Commission, consisting of a chairman and between two

and four other members, shall be appointed by the Governor on the advice of the Prime Minister. Its duty will be to divide Sierra Leone into constituencies as nearly equal in population as possible, taking into account means of communication, geographical features and the distribution of different communities. Certain financial measures may be introduced only if they have the Governor-General's recommendation, signified by a Minister.

Parliament must sit once at least in every year. The maximum life of Parliament will normally be five years but it may be dissolved earlier. A general election must be held within three months of a dissolution.

Executive authority is vested in the Queen and may be exercised on her behalf by the Governor-General. With certain exceptions, the latter acts on the advice of a Cabinet of Ministers, who are collectively responsible to Parliament. The Governor-General appoints as Prime Minister the person who appears to command a majority in the House of Representatives. Other Ministers are appointed from among the Members of Parliament on the advice of the Prime Minister. The Governor-General may exercise the prerogative of mercy on the Queen's behalf, acting on the advice of the Prime Minister.

When the office of Attorney-General is established as that of a Minister, there will be a Director of Public Prosecutions, whose office will be a public office.

The constitution makes provision for a Supreme Court and a Court of Appeal, for appeals from the Court of Appeal to the Privy Council and for the setting up of an executive Judicial Service Commission. It also makes provision for the independence of the judiciary. The Chief Justice is appointed by the Governor-General on the advice of the Prime Minister, and other judges of the Supreme Court on the advice of the Judicial Service Commission.

Normally, a judge of the Supreme Court or of the Court of Appeal shall hold office until he attains the age of sixty-two. If the Prime Minister represents to the Governor that a judge of either court ought to be removed on the ground of misbehaviour or inability to perform the functions of his office, the Governor-General shall appoint a tribunal to consider the matter and may remove the judge if the tribunal recommends that the matter be referred to the Judicial Committee of the Privy Council and the latter advises the Queen that the judge should be removed. The tribunal will consist of not less than three persons who have held certain judicial offices, appointed on the advice of the Prime Minister.

Appeals from the decisions of the Court of Appeal shall lie to the Privy Council as of right in certain cases and with the leave of the Court of Appeal in other cases.

A chapter on finance provides for the establishment of a Consolidated Revenue Fund, the authorisation of expenditure from this fund and for the remuneration of the Governor-General and certain other officers. It also provides for the appointment and functions of an independent Director of Audit.

Responsibilities for appointments, discipline and dismissals in the public service are vested in an independent executive Public Service Commission, consisting of a chairman and between two and four other members, except that power to make certain appointments, such as Sierra Leone's principal representatives abroad, permanent secretaries and the Director of Audit, is vested in the Governor-General, acting on the advice of the Prime Minister after the latter has consulted the Public Service Commission (Commonwealth Survey, C.O.I., June 20, 1961).

Privy Council

The Sierra Leone (Procedure in Appeals to Privy Council) Order in Council, 1961, revokes, in so far as it applies to Sierra Leone, the Sierra Leone and the Gambia (Appeals to Privy Council) Order in Council, 1959, and makes provision for the procedure in appeals from the Court of Appeal of Sierra Leone to the Judicial Committee of the Privy Council (S.I. 1961 No. 742).

South Africa

Application of United Kingdom Law

The Republic of South Africa (Temporary Provisions) Act, 1961 (9 & 10 Eliz. 2, c. 23), received the Royal Assent on May 18, 1961.

This Act continues in force all existing United Kingdom law (unless contrary provision is made by a competent authority) so far as its operation relates to South Africa for one year from May 31, 1961, the date on which South Africa leaves the Commonwealth (s. 1); section 1 (3) contains similar provisions in relation to the law of Southern Rhodesia and every colony, protectorate or United Kingdom trust territory, with savings as to the laws of the Federation of Rhodesia and Nyasaland; section 2 short title.

The Act came into force on May 18, 1961, the date on which it received the Royal Assent.

The relationship between Britain and South Africa, outside the Commonwealth, from May 31, 1961, was discussed in the House of Commons during the passage of the Bill on April 24, 1961 (639 H.C. Deb. 101–180), May 1, 1961 (639 H.C. Deb. 1041–1086), and on May 3, 1961 (639 H.C. Deb. 1398–1468). The House of Lords debated the same matter on May 11, 1961 (231 H.L. Deb. 370–382).

United Nations

During the fifteenth session of the General Assembly of the United Nations, which ended on April 22, there were lengthy debates on the three South African items, namely the racial policies of the Union (*apartheid*), South-West Africa, and the treatment by the Union authorities of people of Indian and Indo-Pakistan origin. In regard to two of these items, *apartheid* and the treatment of persons of Indian and Indo-Pakistan origin, there was a change in the voting record of the United Kingdom representatives on the General Assembly and its Special Political Committee. In previous years United Kingdom representatives had either opposed or abstained on General Assembly resolutions critical of South Africa in connection with these items, on the ground that they constituted intervention in the internal affairs of a member country which was incompatible with the provisions of the United Nations Charter. In 1961 they voted in favour of such critical resolutions, holding that the grave international repercussions of *apartheid* justified such exceptional measures.

In debates during March and April the General Assembly adopted two resolutions on South-West Africa.

The first resolution, adopted on March 16, appealed to member States having "particularly close and continuous relations" with the Government of South Africa to bring "all their influence to bear" on that Government to ensure that it give effect to previous resolutions adopted by the General Assembly. Reference was made in particular to resolution 1568, adopted in December 1960, which *inter alia* invited the committee on South-West Africa (a committee of the General Assembly) to go to South-West Africa to investigate and report on the situation. The March 16 resolution was adopted by the General Assembly by seventy-four votes to none, with nine abstentions. The United Kingdom abstained.

Explaining the United Kingdom vote, Mr. Smithers, the U.K. representative, said that they had always believed in a policy of seeking a negotiated settlement of the South-West Africa question. However, he did not think this would be achieved if the United Nations sought a short cut by ignoring legal and juridical problems and by exceeding the terms of the mandate. The resolution, in his view, contained provisions that clearly prejudiced matters on which the International Court of Justice had been asked to decide in the action brought before it by Ethiopia and Liberia. Moreover, Resolution 1568, on which the present resolution was based, contemplated action which far exceeded the terms of the mandate. Accordingly, his delegation had been obliged to abstain on the vote.

A second resolution adopted by the General Assembly censured the Union of South Africa for its refusal to co-operate with the United Nations over earlier resolutions concerning South-West Africa. It deplored "attempts at the assimilation of the territory" and drew the attention of the Security Council to a situation "which, if allowed to continue, will, in the General Assembly's view, endanger international peace and security." It requested the Committee on South-West Africa to carry out the investigations previously called for "with the co-operation of the Government of the Union of South Africa if such co-operation be available, and without it if necessary." The resolution was adopted by the Fourth Committee by seventy-six votes to none, with six abstentions. In plenary the resolution was adopted on April 7 by eighty-four votes to none, with eight abstentions. The United Kingdom abstained on both occasions. South Africa did not participate in the vote.

In explaining the United Kingdom vote in the Fourth Committee, Mr. Smithers again pointed to the need to take legal considerations into account. The United Kingdom was "opposed to *apartheid* or to racial discrimination wherever they are practised; they were reprehensible morally and calamitous politically." The United Kingdom Government had, by its policies in Africa and elsewhere, probably done more than anyone to throw the practice of *apartheid* into isolation, and it had no wish to defend its application. But the United Kingdom declined to vote for resolutions which though sometimes acceptable in substance were objectionable in law (Commonwealth Survey, C.O.I., May 9, 1961).

Tanganyika

Independence

The Report of the Tanganyika Constitutional Conference, 1961, has been published (Cmnd. 1360).

Three Orders in Council, together with further Royal Instructions, had been appended to give effect to the agreement reached at the Conference that full internal self-government be introduced on May 1, 1961.

The Tanganyika Order in Council, 1961, has as its purpose the making of further amendments to the Tanganyika Order in Council, 1920, so as to set up a Cabinet (consisting of a Prime Minister and other Ministers) for the Territory and to require the Governor to act, in general, in accordance with the advice of the Cabinet. Certain subjects, such as defence, external affairs and the public service, are still reserved for the Governor (S.I. 1961 No. 738).

The Tanganyika (Public Service Commission) (Amendment) Order in Council, 1961, amends the principal Order in consequence of the establishment of internal self-government in Tanganyika under which the Governor is normally obliged, except in relation to public service matters, to act on the advice of his Ministers (S.I. 1961 No. 739).

The Tanganyika (Legislative Council) (Amendment) Order in Council, 1961, makes further amendments to the principal Order in consequence of the establishment of internal self-government in Tanganyika. It provides for the Legislative Council to be renamed the National Assembly and removes the *ex officio* members therefrom. The Governor's reserved powers in respect of legislation are now confined to matters affecting the Royal prerogative or defence and external affairs (S.I. 1961 No. 740).

The Tanganyika Royal Instructions, 1961, made on April 14, 1961, provide for the establishment of an Advisory Committee to advise the Governor on cases where a court has imposed a sentence of death.

See also East Africa High Commission.

Uganda

Relationships Commission

Report. The report of the Relationships Commission, under the chairmanship of the Earl of Munster, has been published and will be considered at a Constitutional Conference to be held in London in September, 1961.

Royal Instructions

Additional Instructions, dated February 27, 1961, issued to the Governor of the Uganda Protectorate, amend the Uganda Royal Instructions, 1958.

West Indies

Constitutional Conference

The Report of the West Indies Constitutional Conference, 1961, has been published (Cmnd. 1417).

Sixteen years have now elapsed since Colonel Oliver Stanley, then Secretary of State for the Colonies, stated in a dispatch to West Indian Governments that it was the aim of Her Majesty's Government to achieve a federation of the British territories in the Caribbean. This statement had been preceded by a campaign organised by prominent West Indians in the period between the two world wars, urging the West Indies to federate. It was followed by a series of conferences which led to the setting up of the present Federation and the inauguration of the first Federal Parliament by H.R.H. Princess Margaret on April 22, 1958.

The Constitutional Conference which met at Lancaster House from May 31 to June 16 was held under Article 118 of the Federal Constitution, which provided for a Conference to be held within five years of the inauguration of the Federation. It had been preceded by an Inter-Governmental Conference of the Federal and Territorial Governments in Trinidad (May 2–16, 1961) which had been reconvened after adjourning on October 8, 1959, when it had failed to reach agreement on proposals concerning the form of the Federal Constitution. This Conference had reached agreement on a wide range of questions, but left certain important issues to be considered at Lancaster House.

The White Paper sets out the main details of a Constitution under which (if it is accepted by the West Indian Governments concerned) the West Indies can move to independence on May 31, 1962. Under this Constitution there will be a Governor-General appointed by the Queen on the advice of the Federal Prime Ministers. There will be a Senate composed of two members from each federating territory, thus ensuring the principle of territorial equality. The number of seats in the House of Representatives will be increased from forty-five to sixty-four, of whom Jamaica will have thirty, Trinidad and Tobago sixteen, Barbados five and the other Territories two each, except Montserrat which will have one. This House will differ from the present Constitution only in that Jamaica and Trinidad and Tobago have been given an increased number of seats. A Standing Committee of the House of Representatives will review the number of seats in 1970 and after that will meet every five years. Any changes which it recommends will be on the basis of a formula which will tie representation of a territory to its population.

As at present there will be Exclusive and Concurrent Legislative Lists. The alterations to the existing lists are set out in Appendix E of the White Paper. A special provision will be made concerning the transfer to the Federal Government of the power to legislate on development of industries and taxes on income and profits. These subjects will be placed on the Concurrent List but any proposal that the Federal Government should legislate on them will require the approval of a majority of each House of the Federal Legislature and an absolute majority of the Representative House of each Territorial Legislature. This arrangement will be reviewed at the end of nine years when the Federal and Territorial Governments will consider whether any change should be made.

The Conference agreed a special formula dealing with Federal legislation on the subject of freedom of movement of persons within the Federation. The Federal Constitution will contain a declaration of intention that freedom of movement is to be the ultimate objective. The subject of control of the movement of persons will be placed on the Exclusive Legislative List, although the legislative powers of the Federal Government on this subject will not be exercised for a period of nine years after independence without the concurrence

of the Territorial Governments. The question of shortening this period will be reviewed at the end of the fourth year by the Federal Government in conjunction with all Territorial Governments. During this period no Territory will legislate to increase or expand any restrictions upon migration now obtaining without the consent of the Federal Government, and, after the expiration of this period, each Territorial Government will have the right to determine, with the concurrence of the Federal Government, the appropriate remedial measures required to deal with any economic disruption that results in a Territory from inter-Territorial migration.

The Customs Union Plan which was agreed provides for the phased introduction of internal free trade and the adoption of a common external tariff to be completed within a maximum period of nine years. The supervision of the Plan will be carried out by a special Inter-Governmental Committee of Ministers assisted by a Standing Advisory Panel of experts. A Federal Customs Law and a Federal Customs Administration will only come into operation at the end of the transition period, when a full Customs Union has been established.

The mandatory levy, which is now the principal source of the Federal Government's revenue, is to be abolished. In order to provide the Federal Government with an independent taxing power sufficient to enable it to meet its developing obligations, the yield from the import duties of customs on all the items in List I in the Customs Union Plan (excluding petroleum products) will be its main source of income. With other receipts, this should provide an estimated total revenue of $28·3 million (about £6 million) per annum. There will be at least two reviews of this arrangement, the first after three years and the second after six years, but if no agreement is reached on additional sources of revenue, the Federal Government will have the power to collect after each review up to 5 per cent. of the total proceeds of import duties levied by Territorial Governments on items in Lists II and III.

Special arrangements have been made for the Turks and Caicos Islands and the Cayman Islands. The position of the Turks and Caicos Islands will remain unchanged on independence in that they will not be represented in the Federal Parliament and will not contribute financially to the Federal Government. They will, of course, cease to be a dependent territory of the United Kingdom and the powers of the United Kingdom will pass to the Federation.

The Cayman Islands will cease to be a dependent Territory of the United Kingdom on independence, and will withdraw from the Federation. They will enter into a special associated status with the Federation under which they will enjoy full internal self-government, and the Federal Government will, by agreement, resume responsibility for their external affairs and defence. These arrangements will last for a trial period of five years, after which a joint review of the position will be carried out. If the islands should then wish to break their connection with the Federation, Her Majesty's Government will give an undertaking, subject to parliamentary approval, to resume responsibility for the Cayman Islands should they petition the Crown for reversion to Colony status.

There will be a further Conference in London opening on January 8, 1962, which will deal with defence, financial, economic, international relations and other matters which concern the independence of the Federation. Her Majesty's Government will discuss with the West Indies at this Conference the form and scale of the economic assistance that the United Kingdom will accord the Federation after independence.

In deference, however, to the representations made during the Conference on behalf of the smaller Territories concerning the urgency of their need for development, Her Majesty's Government have stated their readiness to send a small official Mission to the West Indies as soon as this can be mounted with the object of considering, in consultation with the Unit Governments of

the Windward and Leeward Islands and the Federal Government, any particular short-term projects which are of special urgency or importance to the smaller islands but which for one reason or another have not found a place within the existing approved development programme. The United States Government have agreed to be associated with this Mission, and Her Majesty's Government and the United States authorities (subject to the availability of Congressional appropriations) would respectively consider the provision of finance for such projects as the Mission might recommend. In the case of the United Kingdom contribution this finance will be additional to the existing Colonial Development and Welfare allocation. In making its examination the Mission will, of course, have to limit its scope to a relatively small number of short-term projects, *i.e.*, those which can be completed within a year or so. Her Majesty's Government are glad to be able to this extent to respond to the representations which were put forward and particularly appreciate the willingness of the United States authorities to associate themselves with the Mission. These arrangements represent a special approach to a specific problem and do not prejudge or prejudice the total amount of assistance which Her Majesty's Government may be able to accord the West Indies in the light of the discussions of the Conference of January 8, 1962.

With so many delegations present it was inevitable that certain of them should record dissent on particular items. It was recognised that the conclusions were *ad referendum* to legislatures. It was made clear that, in accepting the scheme as a whole for the purpose of presentation to their legislatures, delegates would be fully entitled to explain the stand which they had taken on particular matters. Nevertheless all delegations were satisfied that the agreed scheme was one which would give the West Indies its opportunity to achieve independence, to play an effective and constructive role in international affairs, and to provide more adequately than hitherto certain common services.

Against this background the Conference agreed to request Her Majesty's Government in the United Kingdom to take the necessary measures to revise the Federal and Unit Constitutions. The Conference agreed that it would not be necessary to hold elections in the Unit Territories specifically in relation to independence but that a Federal General Election should be held, on the basis of the new Constitution, not later than six weeks after Independence Day. Her Majesty's Government has therefore agreed (subject to these proposals being accepted by the West Indian Governments concerned) to introduce legislation to grant the West Indies independence on May 31, 1962.

The Conference also expressed the desire of the West Indies to become on independence a Member of the Commonwealth. Her Majesty's Government warmly welcomes this proposal and will consult the other Commonwealth Governments with a view to securing their concurrence.

On June 19, 1961, the Colonial Secretary made a statement in the House of Commons on the Conference (642 H.C. Deb. 948–954; 232 H.L. Deb. 409–412).

Leeward and Windward Islands Conference

The Conference at the Colonial Office, concerning amendments to the constitutions of the Leeward and Windward Islands which will be needed when the West Indies Federation becomes independent, was held from June 19 to June 22, 1961. Delegates attended from the seven Units concerned, the Federal Government and the United Kingdom Government. The Conference considered the composition of the legislature and allied matters, and agreed proposals in relation to the executive, the public service, the judiciary, the police, the future title and system of appointment of Administrators, the procedure for amending the Constitution and the timing of the constitutional changes which, it was decided, should come into effect with the Independence of the Federation, on May 31, 1962.

BOOK REVIEWS

THE LAW OF SEWERS AND DRAINS. By J. F. GARNER, LL.M., Solicitor, Town Clerk of Andover. Second edition. [London: Shaw & Sons, Ltd. 1960. xxxix and 169 and (index) 14 pp. 30s. net.]

THE title page of this book bears the observation of Wills J. that "the whole of our sanitary legislation is in a state which I hardly like to characterise in the language that naturally suggests itself." The observation is as pertinent today as it was in 1896, and Mr. Garner's avowed object is to bring some degree of order out of chaos. Within the limits of what is practicable Mr. Garner succeeded in achieving his object in the first edition of his book, and the present edition is a welcome repetition of that success which takes account of such changes in the law as have occurred since 1950.

Various tests which the reviewer has made have found neither the book nor its index to be deficient. It can be recommended as a conveniently sized and helpful companion to all those who are engaged in local government practice. Mr. Garner's precise ordering of his subject must not however delude us that all is well with this branch of the law.

MICHAEL MANN.

THE MACHINERY OF JUSTICE IN ENGLAND. By R. M. JACKSON, LL.D. Third edition. [Cambridge University Press. 1960. xiii and 417 pp. 45s.]

THE previous editions of this book have established its reputation. It can be read with profit by the layman, student, practitioner and teacher of law. It criticises, in an informed and (usually) moderate way, and praises, where praise is due. The book lives up to the reviews printed on the dust cover: what more can one say?

The third edition will maintain the book's ascendancy. It is longer than the second edition (despite a slightly smaller typeface), for Dr. Jackson has added a section on the Restrictive Practices Court and has extended and largely rewritten the chapter on Special Tribunals (should not the defence cited in the footnote on p. 326 have alleged that the kettle was returned in good condition?). Throughout he has added, subtracted, and occasionally changed his emphasis or his predictions (*e.g.*, on fusion of the two branches of the profession).

The book has the outstanding merit (not always prominent in law books) of being readable. In considering books on English legal institutions, Jackson must be ranked as the best buy.

AUBREY L. DIAMOND.

THE OXFORD LAWYER, Vol. 3, No. 2. (Michaelmas 1960.) Edited by JONATHAN M. L. STONE and CHARLES D. L. CLARK. [Christchurch, Oxford. 3s. 6d.]

THIS issue of *The Oxford Lawyer* is devoted to the subject of legal education, with contributions by Sir Sydney Littlewood on education for solicitors, Mr. Robert Goff on training for the Bar, Professor Griffith on law in the universities and Mr. Michael Zander on the study of law as a liberal education. Mr. Gershon Ellenbogen also contributes a short but interesting analysis of the university backgrounds of our superior judges (from which it appears that over half are Oxonians).

Though the contributions are short, they contain much of interest. On the practical side, both Sir Sydney Littlewood and Mr. Goff are inclined to the view that specialisation in practice might be reflected in a greater range of optional subjects in the final stage of the professional examinations. For the Bar, Mr. Goff favours a division of the Bar Final into two alternatives: a set of subjects on the Chancery side and another on the Queen's Bench side, to be followed by a compulsory course in practical subjects relevant to either side, on the lines of the optional course recently introduced by the Council of Legal Education. A final course of this sort would go some way to meet the need for practical training, but the most sensible solution of this and other problems is probably to allow partnerships at the Bar.

Professor Griffith and Mr. Zander are both concerned with the way law should be taught at universities and come to much the same conclusion. Opposed to vocational training as such, they both think that the main object of university education should be to teach law in a social setting, topics being selected which lend themselves to this approach. Vicarious liability, illegality in contract and planning legislation are examples suggested by Professor Griffith, while Mr. Zander instances Professor Gower's *Modern Company Law* as a model of how it can be done. Few will question the value of this approach, though we should not ignore the educational value of an analysis of legal rules divorced from their social setting. Time is the crucial factor. The detailed knowledge of the basic common law subjects expected nowadays by university examiners imposes a heavy burden on students and is not easy to reconcile with repudiations of vocational instruction. We should be more ready to prune subjects by cutting out complex topics of little practical importance, such as infancy in contract. This would leave more time for deeper studies of selected topics. Nor should the vocational value of a topic in itself be any objection. As Mr. Zander justly points out, the claim that the study of law can provide a liberal education must depend, not on the subjects dealt with, but on the way in which they are treated.

DOUGLAS PAYNE.

PRINCIPLES OF LOCAL GOVERNMENT LAW. By SIR IVOR JENNINGS. Fourth edition by J. A. G. GRIFFITH. [xxii and 316 pp. University of London Press. 18s.]

SIR IVOR JENNINGS' *Principles of Local Government Law* was first published in 1931; the third edition came out in 1947, and so much has happened since then that it had come to be very much out of date. There is, however, no lack of textbooks of this nature—descriptions of English Local Government written by lawyers whose interest lies more in *ultra vires* and certiorari than in how a town clerk guides his committees or the functions and character of English mayors. There is Jackson's *Structure of Local Government in England and Wales*; Cross's *Principles of Local Government Law* and (probably best of all) Hart's *Introduction to the Law of Local Government and Administration*, besides other smaller works. In such books there is a danger of dryness, for it must be admitted that the legal aspects of local government machinery can be dull. But Sir Ivor Jennings and Professor Griffith contrive to avoid this danger, without sacrificing the clarity of their legal exposition.

In bringing the book up to date, Professor Griffith has done a careful and useful job. Even so, there are one or two points on which he is open to challenge, for example, the statement on p. 116 that the mayor "is a Justice of the Peace for the borough and for the county, and presides at all meetings of the Borough Justices." This was true when the last edition was published, but since the passing of the Justices of the Peace Act, 1949, the mayor is a justice either for the county or for the borough, but not for both, and he no

longer has the right to preside on the Bench. So also it is implied on p. 84 that boroughs, but not urban district councils, are entitled to a coat of arms; in fact, the College of Arms has granted coats to many district councils.

But such errors are few and not of great importance. They do not essentially affect the value of the book. More serious perhaps is the absence of a bibliography. Admittedly, there are references to other textbooks in the footnotes; but of these references fifteen are to books by Sir Ivor Jennings; four to books by other writers.

The real test of the book, however, is its value to students—for it is for them that it is written. One can confidently say that this new edition will be valuable to them, and supply them with readable and accurate information.

BRYAN KEITH-LUCAS.

HIGHWAY LAW. By C. A. CROSS and J. F. GARNER. [London: Sweet and Maxwell Ltd. 1960. xxx and 505 pp. 4 gns. net.]

THIS volume in Sweet and Maxwell's Local Government Library is a statutory analysis of the Highways Act, 1959. That Act was based on the Report of the Committee on Consolidation of Highway Law (Cmnd. 630), a document of interest to anyone who likes to grapple with the legislative process at its most technical. Parliamentary Counsel drafted the Bill and the Committee, consisting of civil servants and local government lawyers, examined and altered it. As the authors record, this Act could not be dealt with as an ordinary consolidating measure because the amendments were more than "corrections and minor improvements." Members of Parliament were asked for a "self-denying ordinance" and there was in fact no division on the Bill and only two minor amendments were made.

The scope of the undertaking is exemplified by the note to section 52 which begins: "This section replaces [the Bridges Act] 1530, s. 7"; and by the fact that the Highway Act, 1835, the Public Health Act, 1875, and the Private Street Works Act, 1892, were all vigorous despite their age until this new measure.

Much of the book is mechanical as such analyses must be. But the sixty-five pages of Introduction are of great value. There will be other, weightier, volumes than this. But for its size, this will stand. (There *must* be a cheaper way of producing comments on statutes.)

J. A. G. G.

FELIX FRANKFURTER: SCHOLAR ON THE BENCH. By HELEN SHIRLEY THOMAS. [Baltimore: Johns Hopkins Press. 1960. 380 pp.]

THE Justices of the United States Supreme Court have been well served by their biographers. Excellent studies already exist or are in the making of Hughes, Stone, Brandeis and Holmes. The present volume is a less ambitious but welcome study of the judicial philosophy and public career of Felix Frankfurter. In its early chapters he is seen supporting radical causes on what, it is suggested, might be called procedural rather than substantive grounds. This "procedural liberalism" is seen as an important clue to the later judicial approach. The distinction was not however clearly perceived in Boston after the Sacco-Vanzetti proceedings or in some other quarters in 1939 when Roosevelt nominated Frankfurter to the Supreme Court Bench. In the Senate Judiciary Committee hearings one witness accused Frankfurter of "masterminding the entire Communist conspiracy in the United States" and the National Director of Constitutional Crusaders for America asked "Why not an American from Revolution Times instead of a Jew from Austria just

naturalised? " (" An American from Revolution Times," said one senator, " would be too old.") A useful insight into the mechanics of open judicial appointments openly arrived at. (But how different from the home life of our own Lord Chancellor.) The widely read Secret Diary of Harold Ickes records, incidentally, that Harold Laski tried without success to persuade Brandeis to retire from the bench in time for Frankfurter's nomination to be made by Roosevelt. Persuading people to resign for the public good does not seem to have been a technique which Laski ever perfected, despite some practice.

One of Frankfurter's first opinions was written in the *Gobitis* Flag Salute case, which raised the question whether the First Amendment freedom of religion was infringed by compulsory flag salute ceremonies in the Pennsylvania public schools in which the children of Jehovah's Witnesses refused to participate. Frankfurter's upholding of the state regulations and his opinions in subsequent cases involving " released time " for religious instruction are said by the author to proceed from an attachment to the values of " social cohesion " and " symbolism." On the latter point the exegesis is unclear. " Symbolism " is first used of the social objects—flags, schools, etc.—about which decisions have to be reached. But before long and without the transition being explained it is being spoken of as a characteristic of the decision process itself. In one breathtaking passage " symbolic " is used in quick succession as an implied synonym for " speculative," " qualitative," " non-rigorous," " non-rational," and " intuitive." To be in favour of these qualities is to strike a blow for the more " inexact theoretical perspective " against modern scepticism, rationalism, absolutism, formalism and similar scourges. " Many of the traditional values of our society," we are warned, " cannot be encompassed within strictly rational limits." Hence " constitutional interpretation has some room for *symbolic* representation." And " although legal reasoning must be based largely on positive grounds, other areas of human perception cannot be totally discounted in arriving at a final decision " about " group freedom in the context of societal living." So, it seems, the Gobitis children could not complain about being expelled from their school. But if Frankfurter's view of the matter really needs this kind of explication, societal living and the non-positive areas of human perception must have taken a nasty knock when the court reversed itself over Frankfurter's dissent in *West Virginia State Board of Education* v. *Barnette* (1943).

A possibly simpler key to Frankfurter's opinions is offered in the author's examination of his views about the secondary role of the court as against elected bodies in the safeguarding of democracy. Moreover, running alongside the general Holmesian thesis about judicial restraint is a belief that certain provisions of the constitution can be classified as having a relatively fixed or " specific " meaning whilst others (as for example the due process clause of the Fifth Amendment) are " generic " and intended by the Founding Fathers to be filled out by posterity. But there seem to be both semantic and historical senses of " specific." In one sense specificity may be imputed on some view about the inherent clarity or narrowness of a word or phrase in the constitution. In the other sense it may be used when the boundaries of the concept are thought to be fixed by the historical understanding of the Founders. There is no reason why these senses of " specificity " should not cut across each other and they often do. One judge may say that the prohibition of the establishment of religion is a " specific response to a *specific historical* evil "; another that it is a *generic concept* to be filled out in the course of time. Similarly, for Frankfurter the injunction that Congress shall make no law abridging the freedom of speech or of the press is a generic provision which " must have the meaning of experience read into it." For Justice Hugo Black it is a prohibition stated in " absolute and unqualified language." Even if views about what is specific coincide it is possible to differ about what a specific term is capable of including—" Bill of Attainder " and " Self incrimination " provide examples. Will the administering of an emetic to force the disgorging of morphia tablets

count as forcible self incrimination? (*Rochin* v. *California*, 1952). Will a rider to a statute which forbids expenditure on the salaries of particular civil servants count as a Bill of Attainder? (*U.S.* v. *Lovett*, 1946).

Equally wide areas of dispute bedevil the more general theories about the role of the court in relation to legislative action. There is an interesting account given by the author of the genesis of the "Preferred Freedoms" doctrine and Frankfurter's reaction to it. A further classificatory distinction is also propounded between procedural regularity and substantive questions of policy which connects with the earlier comment about the nature of Frankfurter's allegiance to radical causes in the 1920s. He is summed up as follows: "Meticulously careful that procedural guarantees are respected when governmental power is being utilized, he leaves substantive questions of policy to those whom the constitution has appointed, the executive and the legislature." In questions of civil liberty of course the distinction between a procedural and a substantive question tends to become blurred and there must surely be something exaggerated in a description of the American judicial function which appears to deny that *any* substantive policies which may conflict with legislative views are entrenched in the Bill of Rights. How to state the fact that such policies may call for enforcement whilst conceding that Congress and the state legislatures are the primary resolvers of conflicting political interests is a problem which sometimes seems to place an unbearable strain on the judicial and political vocabulary in the United States. The most unsatisfactory parts of the commentary in this volume in fact occur when distinctions are being drawn between the general approach to the constitution of which the author approves and the approach of those Justices whose "absolutist" approach, particularly to First Amendment questions, incurs censure. There is some confusing tying on of natural law labels here. Mr. Justice Frankfurter is said on the one hand to be trying to make use of "the very essence of abstract notions and general concepts" in order to "bring them up to date"—a queer enough proceeding in any event. This seems to be what is later applauded as "tough-minded relativism" as against "soft-hearted absolutism." Yet the soft-hearted "activist" judges, Black and Douglas, are also, and apparently wrongly, "seeking out the essence of human existence." Unfortunately they are looking for it in the wrong place, namely the eighteenth century. They desire, it is said (though how it follows is not explained), to have the Supreme Court "give something more than legal protection" and they are "pushed to utter subjectivity on the basis of political humanitarian considerations." Meanwhile Mr. Justice Frankfurter is pictured journeying perilously along "the frontiers of legal thought" (what is on the other side?) trying to "isolate the ultimate values in human personality and society." His "metapsychotic" method, it is added, is "no doubt open to question." (Open to it and asking for it, one might suppose, if that is really what it is.) This method, we read, is "one facet of much current thinking about human perception in general"; and other manifestations are "Jung's theory that long-range values of mankind can be distilled partly from the collective unconsciousness of the human race and the radically empirical (radical? empirical?) undifferentiated field consciousness that modern Confucian, Buddhist and Hindu thought attribute in common to all persons." Readers anxious to pursue this line of thought are instructed by footnote to turn to an article on the "Mediational Approval Theory of Law." Others may wish to hurry on.

Happily there is much else in this book which the excursions into solemn nonsense cannot spoil. British readers will learn much about the recent history of the Supreme Court and derive a great deal of information about one of its most provocative and subtle personalities. One can, however, hardly help noticing in passing that current fashion in description of the judicial process in the United States has taken a curious turn. Once upon a time the image of judicial geometry was countered by casting the picture in terms of political decision. Then there were sociological reflexes. And now, from a glance

through some recent books and articles on such matters as "The Supreme Court and the Moment of Truth" one might well infer that the task of the highest tribunal can only adequately be portrayed as a species of incommunicable psychic orgasm.

GEOFFREY MARSHALL.

PUBLIC LAW

Winter, 1961

Comment

Public administration and the law relating to it are included in examination syllabuses designed for many various purposes. University courses in political science, economics, law and sociology at both undergraduate and graduate levels; professional courses for lawyers and public servants, central and local; courses for secretaries; school courses leading to the advanced level of the General Certificate of Education—all these and others may include the subject. The standard of teaching varies greatly. Textbooks abound, some of them very bad; the editor of *Public Administration* was recently moved to say of a thirteenth edition that it was " definitely not a book to buy."

A few months ago, Professor W. A. Robson, as chairman of the Executive Council of the Royal Institute of Public Administration, spoke on the present state of teaching and research.[1] He emphasised the immense increase in the recent demand for education and training in public administration and criticised the civil service in Great Britain for the defects of its training policy. He compared the British and American approach. " The American school," said Professor Robson, " has turned away from the personal and institutional aspects of government to the informal and psychological relationships within and between administrative organisations," and this he found " abstract and remote." He concluded that we, in Great Britain, were, in contrast to the Americans, " dealing with the right subject-matter " but that we needed more field-work to show how administrators really worked.

With all of this, it is easy to agree, and to be glad that Professor Robson has said it. Recently the Royal Institute has published the first volume of its *Administrators in Action*, by Professor F. M. G. Willson, which represents a little of that field-work called for by Professor Robson.[2] This volume contains five case studies of specific administrative problems, and the way in which they were proceeded with. Clearly the author received very considerable co-operation from central and local authorities. And the result is instructive and valuable.

1 (1961) 39 *Public Administration* 217.
2 George Allen and Unwin.

Generally, however, the British approach to public administration and public law suffers from defects comparable in quality to the American approach though very different in kind. " University teaching in Britain," said Professor Robson, " is usually concerned with such topics as the organisation and structure of public authorities, their functions and responsibilities, the administrative, executive and judicial powers of executive organs, the relations between the executive and the legislature, public finance, judicial review, centralization and decentralization, delegation and devolution, accountability and control, planning and co-ordination, the relation of politics to administration, personnel policy, and so forth."

The emphasis is thus most clearly placed on institutions, their relationships with each other, and their formal working. What they *are* is continuously and deliberately divorced from what they *do*. Professor Robson, in his reference to the need for more field-work, shows his awareness of this defect. But is it not much more than a mere defect to be corrected by a particular remedy? Is it not of such dimensions that it reveals a fundamentally wrong approach? Professor Robson likens the American approach to abstract art " which makes no attempt to represent objects in the real world." But is not the formal description of institutions, their composition and relationships, also abstract?—the placing of objects in space, the hanging of skeletons on wire frames, so that government departments, local authorities, nationalised industries, the Budget, select committees, the courts and the rest of the collection are viewed as pieces of machinery without adequate explanation of their productive purposes.

Discussion of their reform and reorganisation emphasises, as a consequence, their constitutional weaknesses, not the degree of administrative efficiency or inefficiency. Books are written which consider the structure, financing and relationship of public authorities and what other institutions (select committees, the House of Commons, committees of inquiry, working parties) say about them. And all this is conducted without reference to the actual administrative processes by which they carry out their tasks or to a description of those tasks themselves. To quote Professor Robson again: " Few studies have appeared showing how government departments really do their work —I can say this after having read all the volumes of the New Whitehall Series."

But not to know what public authorities do and by what process they arrive at decisions makes study of the institutions positively misleading, and means that criticism is wrongly directed. " On the basis of interviews with officials high and low in the Ministry of Housing and Local Government, I can report that the extent of the understanding of the principle that extra-record facts should be made

known to parties adversely affected by them is little understood and often violated; high officials justify the violations by saying merely that they know of no demand for disclosures of extra-record facts." So reports an eminent American authority.[3]

The study of public law is in no better shape. That part called constitutional law is rarely concerned at all with what happens and the decisions of the courts are often intellectual exercises which make no attempt to ponder the conflicting claims of private rights and public responsibilities. In the textbooks will be found passages which advance propositions about Parliament, the electorate, government departments, Ministerial responsibility, local authorities, and the judicial function, which can be explained only on the assumption that the writers are either without practical knowledge of politics or regard politics as something not to be mentioned in front of the children. Further, there are no books on administrative law which approach the subject through the administrative process, by showing the way in which decisions are taken and the political and legal forces which shape those decisions. A common reply to this complaint is that in the United Kingdom it is very difficult to get at the material, especially where it is secreted in the files of the central departments. Professor K. C. Davis has written: "In English University circles, a suggestion has often been made that civil servants will give an American what they will withhold from an Englishman. Perhaps so, but I found no confirmation of this in talking with civil servants, who uniformly told me that they would not withhold from Englishmen anything that they had given me. It is possible, of course, that my sampling is unrepresentative." [4]

University opinion may indeed be out of date on this matter. Indeed, it is our recent experience that civil servants like to talk about their problems, on two conditions. The first is that the discussion is kept clear of specific matters of current controversy. The second is that the inquirer has taken the trouble to learn all that can reasonably be learnt outside the department. This willingness to discuss may be a recent development and may reflect the greater understanding of the civil service among academics, based in part on the increased use made of them by the departments themselves.

We are, therefore, in this country in the remarkable position that almost nothing has been written on the way in which public servants go about their business. We know bits and pieces. There have, for example, been studies of pressure groups, of the campaign for independent television, of rent tribunals and of local inquiries; judicial

[3] K. C. Davis, "The Future of Judge-made Public Law in England," 61 Col.L.R. at p. 208.
[4] *Ibid.* at p. 208, note 18.

review of administrative action has been comprehensively described; general descriptions of the legislative process are available; and so on. But detailed accounts of the substantive process of administration are generally not to be had. And until this work is done, the study of public administration and the law relating to it will remain formal and unreal.

Appointment of a Chief Constable: the Kilmarnock Case

The misfortunes of Brighton and Kilmarnock have at least done something to clarify the position of police authorities in exercising their powers of appointment and dismissal. It may be that there is a causal connection of a sort between the two cases. The keynote in ritual speeches about the British police has often been their status as citizens of a locality. Experience, more or less confined to England and Wales, however, has led to an emphasis in official thinking on the value of outside appointments at the top as putative barriers to an excess of local democracy. In October 1958 the policy was unofficially promulgated in Scotland in a speech at the Tulliallan Police College by the Secretary of State, Mr. John Maclay. He asked police authorities to consider whether the appointment as chief constable of an officer who had spent his service in the force concerned was in general desirable. Width of experience and an open and fresh approach were more likely to be found, he said, in candidates from outside the force. In May 1960 the chief constable of Kilmarnock retired and the local council as the police authority placed the deputy chief constable on the list of six applicants and having reviewed the candidates decided to appoint him. They did not want a fresh approach, being highly satisfied with the work of the deputy. At a meeting in the Scottish Home Department the council were informed of the Minister's policy and told that approval could not be given to the appointment. Nonetheless the council reconfirmed, or at least reaffirmed, their desire to appoint the deputy chief and the Secretary of State reasserted his unwillingness to confirm. The council refused to accept this decision, maintaining that they were unable to perform the duty of appointing a chief constable laid upon them by section 6 (1) of the Police (Scotland) Act, 1956. In June an action was raised in the name of the Provost, Magistrates and Councillors of the Borough for declarator that the Secretary of State was not entitled to withhold his consent to the appointment on the ground stated by him, and could not at his discretion lay down a qualification for appointment of a chief constable not mentioned in the statutory regulations prescribing those qualifications.[5]

[5] *Magistrates of Kilmarnock* v. *Secretary of State for Scotland*, 1961 S.L.T. 333.

Under the Police (Scotland) Act, 1956, the Secretary of State is empowered to make regulations for the government and administration of police forces and under the Police (Scotland) Regulations, 1956, as amended in 1957, regulations had been made prescribing the qualifications for appointment of chief constables. Service in a force other than that for which the appointee was being considered was not one of the qualifications. Since the regulations when made had in form at least to be approved by the legislature the pursuers' claim was that the Secretary of State was attempting in effect to legislate by proclamation, usurping the function of Parliament and breaching the statute. Possibly recalling the Minister's earlier incumbency at the Ministry of Transport they added that he had gone through the provisions of the Act "with the bulldozer of administrative discretion." [6]

Lord Cameron in the Outer House of the Court of Session described the differences between the parties as "deep but narrow." The question essentially was whether what the Minister had done could be described as making an extra-statutory regulation as to qualification. He thought that it could not, though "the dividing line between the legitimate pursuit of a general policy in a matter of administration and the enforcement of an extra statutory regulation may be narrow and sometimes difficult to draw." What the Secretary of State was doing, properly considered, was to follow a policy determined by general administrative considerations. Accordingly, the Lord Ordinary concluded, neither the candidates for office nor the police authority had lost any rights to which they were entitled. The authority had never had the right to insist on their appointment nor to know the Minister's reasons for refusing his approval. Candidates had only been guaranteed by the regulations the right to be considered, not the right to be appointed, and this they still had since the Minister was prepared to consider exceptions to his general principle.

The conclusion that the regulations made under the Police Acts are not intended to trench upon the Secretary of State's power to confirm or reject particular appointments is no doubt correct but the distinction between policy and illicit regulation does not support it very persuasively. Some emphasis was placed on the Shorter Oxford Dictionary and upon the proposition that a "qualification" for appointment meant a necessary condition (though most people, one supposes, would not choose to allow lexicography to dictate here between "necessary" and "necessary and sufficient"). It is unclear which side of the argument this told upon, since if the Secretary of State's decision involved imposing a "qualification" it was in fact a necessary one and not less necessary here because suspended in

[6] *Ibid.* at p. 339.

other cases. The Minister's argument, which was accepted, rested upon the view that he was not prescribing a qualification at all. For it was conceded on his behalf that all " qualifications " for office must be set out in the regulations and made in accordance with the Act. It was not, it was said, open to the Minister to add to the qualifications and to promulgate his additional qualifications in any manner he wished. This is surely (except for ingenuity and the Shorter O.E.D.) inconsistent with the view that the Minister is entitled in his administrative discretion to conceive, promulgate and enforce additional necessary conditions, which, on his decision to apply them, the appointing authority must accept.

On August 1 the Kilmarnock appointment was debated in the House on the adjournment. The Secretary of State said in the course of the debate that his principle of outside appointment was a flexible one. Mr. William Ross (Kilmarnock) thought that it was so flexible as to be unobservable from anywhere but Kilmarnock. The Minister, he said, had shelved the general principle and allowed the appointment of chief constables from within the force in Glasgow, Greenock, Coatbridge, Roxburgh and Selkirk, Lanarkshire and Argyll. In reply Mr. Maclay said that it was necessary when permitting an exception to weigh up a whole series of matters, including the size and nature of police forces and candidates' lengths of service in the forces concerned and a number of other considerations. He added: " But I do not think that it would be right or appropriate for me to attempt to analyse the extent to which the different considerations have carried weight in the various cases to which hon. members have referred." [7] —a sentiment which might well have fallen from the Secretary of State for Home Affairs himself, and possibly did.

G. M.

Dismissal of a Chief Constable: The Brighton Case

The action for a declaration that his dismissal was void and damages for wrongful dismissal brought against the members of the Brighton Watch Committee by the former Chief Constable raises some interesting questions of administrative law, though these were not dealt with at length in the judgment.[8]

The main part of the judgment is the least interesting. It deals with the question of whether a watch committee when dismissing a chief constable must comply with the regulations made under the Police Act, 1919, which lay down the procedure to be followed and

[7] 645 H.C. Deb. c. 1374 (at 3.30 a.m.).
[8] *Ridge* v. *Baldwin* [1961] 3 W.L.R. 1054.

whether these regulations supersede the power of dismissal under the Municipal Corporations Act, 1882, section 191 (4), which is apparently purely arbitrary. Streatfeild J. held that just as it would be ridiculous for the watch committee to give a police officer convicted of a criminal offence detailed notice of the charges against him so it would be equally farcical to do so in this case where the plaintiff's dismissal was based on his own admissions in criminal proceedings. In such cases the power of dismissal under the 1882 Act still exists.

The next question was as to the procedure to be followed under the 1882 Act. Although the Act is silent on the point, Streatfeild J. held that there must be read into the Act a duty to exercise the power of dismissal not only in good faith but also in accordance with the rules of natural justice. This is how he reached his conclusion: " I think he (counsel) is right when he submits that one has to consider what it is that the watch committee are doing. It is not merely an administrative matter as a result of which some person may be prejudiced or may be deprived of the right of property and so on; the committee were here taking a very serious step under an Act of Parliament which of itself gave no right of appeal: they were exercising their right to dismiss a man, to deprive him at the age of 58, I think it was, of his living and to deprive him of his accumulated pension rights, although they would be obliged to return the contributions to him " (at p. 1065). It is heartening to find this judicial rejection of the approach adopted in *Nakkuda Ali* v. *Jayaratne* [9] and *R.* v. *Metropolitan Police Commissioner ex. p. Parker.*[10] It is also interesting to find the right of property relegated under the heading of an administrative matter. The courts have always regarded property rights as being entitled to the protection of the rules of natural justice, *e.g.*, *R.* v. *Hendon Rural District Council ex. p. Chorley* [11] and *Errington* v. *Minister of Health.*[12]

Having held that the rules of natural justice applied, Streatfeild J. then proceeded to hold that they had been observed in the circumstances of this case. " In these circumstances, just as if he had been convicted of a criminal offence, I have come to the conclusion that, although he now complains that he ought to have been heard, that he ought to have had specific charges formulated against him and particulars of this unfitness for office; and that he ought to have been given the opportunity of being heard and to call witnesses, on the evidence which he himself gave at the Old Bailey there was no need for the watch committee to do other than they in fact did." He then

[9] [1951] A.C. 66.
[10] [1953] 1 W.L.R. 1150.
[11] [1933] 2 K.B. 696.
[12] [1937] 1 K.B. 164.

added: "It is true that if they had desired to be particularly punctilious, they might have taken the opposite procedure." [13]

The decision becomes controversial when the judge states an alternative ground of decision in case he should be wrong on the first two grounds. He held that since the plaintiff had appealed from the decision of the watch committee to the Home Secretary under the Police (Appeals) Act, 1927, and as section 2 (3) of that Act provides that the Home Secretary's decision shall be final and binding on all the parties, he had waived his right to go to the courts even though the plaintiff's solicitor made it clear to the Home Secretary that he reserved the right to contend that the dismissal was a nullity.

This part of the judgment is open to several fundamental objections. First, an appeal from a decision is an act of disaffirmation, not of affirmation of the decision of the lower body. This point was made by Lord Denning in the recent Privy Council case of *Annamunthodo* v. *Oilfield Workers' Trade Union* [14] when the court rejected a similar argument that the plaintiff who had appealed against his expulsion from his trade union to the Annual Conference of Delegates had thereby lost his right to complain to the courts that his expulsion was void because it was contrary to natural justice. Lord Denning said [15]: "Even if the order of expulsion were capable of being affirmed or disaffirmed their Lordships cannot regard an appeal as an act of affirmance. On the contrary it is a disaffirmance—a complaint against the order of expulsion. If he had not appealed, it might have been said that he should have done so, that he should have exhausted all internal means of redress, before having recourse to the courts. . . . It was therefore quite proper for him to appeal to the Annual Conference before coming to the courts, even though he was not bound to do so. But, having appealed and failed, he does not by doing so forfeit his right to redress in the courts. If the original order was invalid, for want of observance of the rules of natural justice, he can still complain of it, notwithstanding his appeal."

The second fundamental objection is that since a decision which contravenes the *audi alteram partem* rule is a nullity, therefore the Home Secretary's decision, which purported to confirm a nullity, was itself a nullity. Streatfeild J. answered this argument by saying that in his opinion the watch committee's decision was not a nullity. This is a confusion of two different arguments. The contention that the appeal estopped the plaintiff from alleging nullity could only arise on the assumption that the watch committee's decision was a nullity *i.e.* that the judge was wrong in his decision on the natural justice point.

[13] *Ibid.* at p. 1067.
[14] [1961] 3 W.L.R. 650.
[15] *Ibid.* at p. 656.

The argument here put forward was adopted by both Singleton L.J. and Denning L.J. (as he then was) in *Barnard* v. *National Dock Labour Board*.[16] The plaintiffs had unsuccessfully appealed against their suspension from work by the port manager to the appeal tribunal, before asking the court to declare the suspensions void for lack of jurisdiction. Denning L.J. said[17]: "So far as the decision of the appeal tribunal is concerned, it seems to me that, once Mr. Hogger's (the port manager) order is found to be a nullity it follows that the order of the appeal tribunal is also a nullity. The appeal tribunal has no original jurisdiction of its own; it cannot itself make a suspension order; it can only affirm or disaffirm a suspension order which has already been made. If no suspension order has been made because it is a nullity, the tribunal can do nothing. . . ."

Thirdly, it is one of the fundamental principles of our administrative law that the court's power to determine whether the rules of natural justice have been observed by an administrative tribunal can only be taken away by express statutory provision. The Home Secretary was not asked to deal with the question of natural justice, for counsel reserved the right to contend that the dismissal was a nullity; but even if the Home Secretary had made a decision on this point it could not have precluded the courts from determining the question which is peculiarly within their jurisdiction. Romer L.J. in *Barnard's* case, when dealing with the analogous question of jurisdiction by the lower tribunal, said[18]: "I am by no means satisfied that this scheme conferred on the tribunal (the appeal tribunal) an exclusive power to decide what is essentially a question of law, namely, the question of construction on this delegation point and to decide it in such a way as to found a jurisdiction for itself so as to exclude any person affected by its decision from coming to these courts for relief by way of declaration or injunction. It seems to me before one can conclude that such an exclusive power is conferred on a lay tribunal of this sort there must be language clearer than that to be found in the scheme."

Was there clearer language in this case? Section 2 (3) of the Police (Appeals) Act, 1927, provides that an order made by the Home Secretary shall be final and binding on all the parties. Streatfeild J. held that this provision could not be circumvented by reserving a right to appeal to the courts. But these words have been construed by the courts on numerous occasions as not excluding judicial review.[19]

The only decision cited by the judge to support his view on waiver

[16] [1953] 1 All E.R. 1113.
[17] *Ibid.* at p. 1120.
[18] *Ibid.* at p. 1122.
[19] *R.* v. *Medical Appeal Tribunal ex p. Gilmore* [1957] 2 W.L.R. 498.

was *Hogg* v. *Scott*.[20] This was also an action for a declaration by a police officer that he had been wrongly dismissed because the regulations had not been complied with. Cassels J. held that as he had been convicted the regulations did not apply. The same argument on waiver was put forward which Cassels J. dealt with in these words, " I think the plaintiff may be said to have waived his right to succeed in these proceedings by appealing to the Home Secretary and accepting and acting upon his decision for three years." One would have thought that the last few words contained the vital difference between the two cases, as undue delay in bringing proceedings is a ground on which the court could refuse to exercise its discretion to grant a declaration. But this distinction cannot be made, as Cassels J. said later in his judgment that he would not have refused to exercise his discretion on this ground because of the difficulties of bringing proceedings in wartime. The only evidence of waiver is, therefore, the appeal itself which, it is submitted, cannot constitute waiver. It is also significant that Cassels J. never had his mind directed to the possibility that the decision of the watch committee might be void for contravening the rules of natural justice. Just before the passage on waiver he cited cases showing that failure to observe the regulations did not make a decision invalid. Thus he did not have to face the difficulties discussed above.

Streatfeild J. stated his conclusion on the waiver point as an alternative ground of decision in case he was wrong on the first two grounds. His statements are, therefore, not obiter but part of the *ratio decidendi*.[21] It is submitted that on this point his decision was out of accord with principle and authority.

G. Ganz.

Appeals from the High Court of Australia to the Privy Council on Inter Se Questions

Section 74 of the Australian Constitution restricts appeals from the High Court of Australia to the Judicial Committee. The clause is a compromise between the original desire of the Australian Founders to abolish appeals to the Judicial Committee on all Australian constitutional questions, unless an Imperial interest were involved, and the desire of Joseph Chamberlain to preserve the appeal by special leave in full. No one knows who drafted its present form, and the central phrase in that form—" A question . . . as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the constitutional powers

[20] [1947] K.B. 759.
[21] *Jacobs* v. *L.C.C.* [1950] A.C. 361.

of any two or more States," is without precedent. Such questions may not be appealed unless the High Court itself certifies that the question ought to be determined by the Privy Council.

It was clear from the beginning that the phrase did not intend to describe *all* Australian constitutional questions, and that it connoted a quality of *mutuality* in the consequences of a decision on the powers of the various governments of the federal system. Probably the draftsman had a false picture of the relations between powers in a federal system; his use of the word " limits " has inevitably caused people to consider powers as a field divided by a fence between two owners, the fence being moved a little this or that way in accordance with relevant decisions. But the complex *propositional* inter-relations in a constitutional system caused by the existence of *exclusive* and *concurrent powers*, and of *prohibitions* which may be on all governments or on some, and may be related wholly, partially or not at all to the definition and distribution of powers, cannot possibly be fitted into such geographical or geometrical metaphors. Hence it is not surprising that in the thirty-odd decisions of the High Court and the Judicial Committee concerned with this section, much highly metaphysical theorising has occurred and much inconsistency and overruling of opinions and even decisions.

In *Dennis Hotels Pty. Ltd.* v. *Victoria*[22] a critical case on the interpretation of the section came before the Judicial Committee and was argued for five days by a brilliant Australian Bar on the sole question whether the case raised an *inter se* issue. The case concerned the validity of State taxes on publicans, having regard to the withdrawal by section 90 of the Constitution from the States of the power to impose excise duties. It is perhaps a pity that learned counsel did not refer their Lordships to a paper by Professor D. J. Derham[23] which, with respect, explains the problems, and also puts the arguments which here failed, more cogently than they were explained and argued before the Board, so far as one can judge from the transcript. The Board held that the case raised an *inter se* question and so could not be heard without a High Court certificate; only one such has been given in sixty years.

The result is that the Board has rejected a refined conception of " correlative effect " as a criterion of the application of section 74 and instead recommends a broad quasi-political approach; it quotes with approval from Australian sources the general phrases " questions which arise in connection with the federal distribution of power between the Commonwealth on the one hand and the States on the other," and " the purely Australian question of the distribution of

22 [1961] 2 All E.R. 940.
23 (1957) IV *University of W.A.L.R.* 19.

the totality of governmental powers on this continent." The decision therefore puts an end to one kind of speculation which took its origin mainly in erroneous earlier dicta of the Board itself, now admitted to be wrong, and in attempts by Dixon C.J. of the High Court to explain those dicta. However, the decision also opens up another line of speculation for the future, since the course of the argument and some passages in the judgment suggest a willingness to re-examine the question how far the construction of a constitutional *prohibition*, whose terms have some relevance to the definition of a constitutional *power*, may raise a question *inter se*, whereas previous dicta rather suggested that constitutional prohibitions taken alone would not under any circumstances raise such questions.

GEOFFREY SAWER.

Printers have been granted a further award, and other costs have increased. It has, therefore, been found necessary to increase the subscription price of PUBLIC LAW *for* 1962 *to* £3 3*s. and the cost of individual parts to* 17*s.* 6*d. per part.*

THE WEDGWOOD BENN CASE

GORDON BORRIE

FEW cases in this century can be regarded as being of such constitutional importance in Britain as the recent *Wedgwood Benn* case. It is proposed here to outline the facts, to examine the legal principles that were at issue both before the Committee of Privileges of the House of Commons and before the Election Court, to look at the attitude of the House of Commons to the problems involved, and lastly to assess generally the constitutional and political implications of the case.

THE FACTS

On November 17, 1960, the death occurred of the first Viscount Stansgate. His eldest surviving son, Mr. Anthony Wedgwood Benn, Labour M.P. for Bristol South-East since 1950, had for some years endeavoured (with his father's encouragement) to avoid the threat of disqualification from the House of Commons that would arise on his father's death. He had, *inter alia*, drawn up a Bill, the Stansgate Titles Deprivation Bill, but this had been rejected by the House of Lords. Shortly after the death of his father, Mr. Benn signed on November 22 an Instrument of Renunciation of the Viscounty of Stansgate, and petitioned the House of Commons to examine and report on "the submission of your petitioner that he is or should remain a Member of the Commons House of Parliament for so long as he may be elected to serve as a member of Parliament. . . ." On November 29, the House of Commons resolved to refer the Petition to the Committee of Privileges, whose Report was published on March 14, 1961.[1] The matters of law that were argued before the Committee of Privileges will be examined more fully below, but the following is a summary of the Committee's conclusions:

(a) Mr. Benn was disqualified from membership of the House of Commons on November 17, 1960, by succession to the Viscounty of Stansgate.

(b) The Instrument of Renunciation executed by Mr. Benn has no legal effect. A peer cannot surrender or renounce his peerage.

(c) The House of Commons Disqualification Act, 1957, does not give the option to Mr. Benn to renounce the Viscounty.

(d) The issue of a Writ of Summons to attend the House of Lords to Mr. Benn would not raise any question of privilege.

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[1] H.C. 142 of 1960–61.

(e) They do not recommend the introduction of a Bill to enable Mr. Benn to remain a member of the Commons House of Parliament.

(f) The terms of the Petition referred to them do not require them to express any view on whether legislation to enable those who succeed to peerages to remain members of, and to be eligible for election to, the House of Commons is desirable.

Prior to the House of Commons debating the Report, the Speaker ruled on March 27 that Mr. Benn might not occupy any of the seats reserved for Members or enter the Division Lobbies. The Speaker gave this ruling on the ground that " until the House decides otherwise, I have no authority to rule save according to what I believe to be the existing law and practice of Parliament applicable to what prima facie appear to be the facts." [2] The Speaker left open the possibility of the House of Commons resolving to permit Mr. Benn to address the House from the Bar during its debate on the Report. A Motion to this effect was, indeed, moved by Mr. Gaitskell on April 13, but was rejected after a three-hour debate.[3] The House then considered the Report of the Committee of Privileges, and resolved to take note of the fact that Mr. Benn, on succession to the Viscounty of Stansgate on November 17, 1960, ceased to be a Member of the House of Commons and to agree with the Committee on their Report. The House rejected a Motion, moved by Mr. Gaitskell, to the effect that legislation should be introduced forthwith to provide for the renunciation of peerages and to allow those who have renounced a peerage to vote in and to be candidates at Parliamentary Elections, and if elected to be members of the House of Commons.[4]

On April 18, the Labour Chief Whip moved for the issue of a new Writ for the constituency of Bristol South-East, and this Motion was agreed. On Nomination Day, April 24, two candidates handed in their nomination papers to the Returning Officer—Mr. Wedgwood Benn (Labour) and Mr. Malcolm St. Clair (Conservative).[5] Two days later, Mr. Butler, Home Secretary, made a statement in the House of Commons that the Government intended to move for the appointment

2 637 H.C. Deb. 957–958. The Speaker declined to rule on a question raised by Mr. Emrys Hughes: " Mr. Speaker, could you say whether Mr. Wedgwood Benn will be allowed into the Crypt to pray that he shall not be permanently buried in the mausoleum called 'another place'?"

3 638 H.C. Deb. 500–562. The precedents cited are examined below.

4 638 H.C. Deb. 565–636.

5 The Returning Officer is given power by statute to refuse a nomination paper on two grounds only: that the particulars of the candidate or persons subscribing the paper are not as required by law, or that the paper is not subscribed as required by law—para. 13 (2), Second Schedule, Representation of the People Act, 1949.

of a Joint Select Committee on the composition of the House of Lords. Mr. Butler gave the following terms of reference[6]:

> "To consider, having regard among other things to the need to maintain an efficient Second Chamber
>
> (a) the composition of the House of Lords,
>
> (b) whether any and if so what changes should be made in the rights of peers and peeresses in their own right in regard to eligibility to sit in either House of Parliament and to vote at parliamentary elections: and whether any and if so what changes should be made in the law relating to the surrender of peerages
>
> (c) whether it would be desirable to introduce the principle of remuneration for members of the House of Lords and, if so, subject to what conditions and to make recommendations."

The Bristol South-East by-election took place on May 4, Mr. Benn coming top of the poll, more than doubling the majority he had obtained in the General Election.[7] Mr. St. Clair immediately presented an Election Petition in the High Court claiming the seat on the ground that Mr. Benn was disqualified as a peer from being an M.P. and, since the facts upon which the disqualification was based were known to the electors, that the votes cast for Mr. Benn should be treated as having been thrown away.

On May 8, the House of Commons again rejected a Motion that Mr. Benn be admitted and heard, and resolved to take note that he ceased to be a Member on succession to the Viscounty of Stansgate and that a new Writ had been issued for electing a Member in his place, and ordered that he be not permitted to enter the Chamber until the House otherwise ordered.[8] Mr. George Brown, Deputy Leader of the Labour Party, had moved unsuccessfully that, notwithstanding the resolution of April 13, the oath should be administered to Mr. Benn and that he should take his seat.

The Election Court proceedings began on July 11 before Gorman and McNair JJ. There followed ten days of argument between Sir Andrew Clark, Q.C., representing Mr. St. Clair, and Mr. Benn representing himself. The reserved judgment of the court, delivered on July 28, declared that Mr. Benn was not duly elected or returned at the Bristol South-East by-election, and the court held it had no option but to declare that the votes cast for Mr. Benn were thrown away and that Mr. St. Clair was duly elected.[9] Mr. St. Clair took his seat in the House of Commons on July 31, after a Motion was approved that the Clerk of the Crown should attend and make an amendment to the Roll of Members.

[6] 639 H.C. Deb. 420–432.

[7] The result was: A. Wedgwood Benn (Labour) 23,275; M. St. Clair (Conservative) 10,231; majority 13,044.

[8] 640 H.C. Deb. 34–164.

[9] [1961] 3 W.L.R. 577; [1961] 3 All E.R. 354.

On August 14, Mr. St. Clair issued a statement to the effect that, since it had been represented to him that he had not been elected by a majority vote, he would resign provided Mr. Benn gave an undertaking not to accept nomination as a candidate. Mr. Benn refused to give any such undertaking and there the matter rests.

The Legal Issues

1. *Renunciation of Peerage*

Before the Committee of Privileges, Mr. Benn, supported by Mr. Dingle Foot, Q.C., M.P., had contended that by the Instrument of Renunciation executed on November 22, 1960, he had renounced and surrendered the Viscounty of Stansgate. Mr. Benn did not rely on this contention before the Election Court, but the court did feel it appropriate to consider whether, in law, a peer could renounce or surrender a peerage. The court held, expressly accepting the view of the Committee of Privileges of the House of Lords in the *Earldom of Norfolk Peerage Claim*,[10] and the view of Viscount Birkenhead L.C., in *Viscountess Rhondda's Claim*,[11] that a peer has no right to renounce or surrender a peerage. The court adopted the dictum of Viscount Birkenhead L.C., that "a right to sit and vote" in the House of Lords "is personal to the holder of a peerage who possesses it. It is a right which can neither be denied nor surrendered. . . ."

The Reports of House of Lords Committees of Privileges were, of course, not binding on the Election Court, but it treated as sound authority the dicta and conclusions of the Committee on what the Committee regarded as being settled law. The *Norfolk Peerage Claim* arose out of a purported surrender of the Earldom of Norfolk by Roger le Bygod in 1302, and a grant of the same Earldom by Edward II to Thomas de Brotherton in 1312. Lord Mowbray, having proved his pedigree as senior co-heir of Thomas de Brotherton, alleged that the Earldom had fallen into abeyance and claimed that the abeyance should be determined in his favour. Basing its conclusion on the principle that a peerage cannot be surrendered, the House of Lords Committee of Privileges ruled that the surrender by Roger le Bygod was invalid, that the grant made in 1312, was, therefore, invalid, and that Lord Mowbray had consequently failed to make out his claim.

The House of Lords Committee of Privileges in 1907 founded their ruling on resolutions of the House of Lords in the *Grey de Ruthyn* case in 1640, where it was said that "no peer of this realm can drown or extinguish his honour (but that it descends unto his descendants) neither by surrender, grant, fine, nor any other

[10] [1907] A.C. 10.
[11] [1922] 2 A.C. 339 at p. 362.

conveyance to the King." [12] Also to the same effect was the advice of Doddridge J. in the *Earl of Oxford's Case* in 1626,[13] and the resolution of the House of Lords in the *Earl of Purbeck's Case* in 1678.[14] There is no doubt that, before 1626, there were a number of instances where peers had purported to surrender their peerages, but as Lord Ashbourne pointed out in the *Norfolk Peerage Claim*,[15] precedents of surrenders had been cited in the *Purbeck* case but were brushed aside, as having been passed *sub silentio* and without contest. "The House proceeded (in the *Purbeck* case)," said Lord Ashbourne, "as if it were declaring clear law, and not as if they were laying down any novel proposition. . . . No case was then cited, and none was cited before us, where the House gave any countenance to the contrary proposition."

2. *Disqualification of Peers*

The chief legal issue raised by Mr. Benn was whether the disqualification of a peer from sitting in the House of Commons arose on succession to the peerage or whether it arose only on the granting of a writ of summons to sit in the House of Lords. Mr. Benn's contention, both before the Committee of Privileges and before the Election Court, was that the disability of a peer to sit in the House of Commons arose not from his status as a peer but from the incompatibility of duties imposed by the issue of a writ of summons to serve in the House of Lords. Mr. Benn himself had not applied for nor received a Writ of Summons, and in practice the Crown only issues the Writ when it is applied for. Consequently, Mr. Benn argued, no incompatibility of service having arisen, he was not disqualified from sitting in the House of Commons.

The issue was a pure question of law—did disqualification depend on status or on the writ? The Election Court said that the question must be determined according to that branch of the common law which related to Parliament. This was to be found in the decisions of the courts, the opinions of writers of authority and the reports of the Committees of both Houses.[16] Both the Committee of Privileges and the Election Court admitted that there was no express decision of the court determining whether a person who had become a United Kingdom peer by succession could, by refraining from applying for a writ of summons, save himself from disqualification to sit in the

[12] *Third Report on the Dignity of a Peer*, Vol. 2, p. 25.
[13] Collins, *Proceedings, Precedents and Documents*, p. 190.
[14] Collins, *op. cit.*, p. 306.
[15] [1907] A.C. 10 at p. 15.
[16] The court did, however, quote Lord Campbell to the effect that neither the reports of committees nor resolutions of either House could alter the law: "The resolutions of the House of Lords or of the House of Commons affecting to alter the law of the land would in Westminster Hall be regarded as so much waste paper" (128 *Hansard*, 3rd series at p. 928).

House of Commons. Nevertheless, it seemed to the Election Court (as it had to the Committee of Privileges), that the authorities, whether embodied in decisions of the courts or in the writings of authors of authority, were all one way with one possible exception. The court referred to passages from *Simeon on Elections*,[17] the Redesdale Report,[18] Sir William Anson's *Law and Custom of the Constitution*,[19] and Erskine May's *Parliamentary Practice*.[20] All of these authorities were to the effect that the status of peerage itself is a disqualification from sitting in the House of Commons.[21]

The one passage in the textbooks which the Election Court found to be out of line with this current of authority was in the latest edition of Halsbury's *Laws of England* under "Elections"[22]:

> "A peer of Parliament is legally incapable of voting at a parliamentary election even though his name may have been placed upon the register without objection. The writ of summons to the House of Lords must be issued before the disqualification attaches."

The authority given for the second sentence is the *Bedford (Borough) Case*.[23] This case involved the procedure known as a writ of acceleration under which the Crown had power to accelerate the descent of a peerage so as to make it pass during the lifetime of the holder to his eldest son just as if the father were dead, and which was exercisable only where the parent was the holder of more than one peerage. The Marquis of Tavistock voted in a parliamentary election although the previous day a warrant for a writ of acceleration, in respect of a barony held by his father the Duke of Bedford, had been published in the *London Gazette*. The Election Committee held the vote to be good.[24] In *Benn's* case, the Election Court felt the case was no authority at all for the wide proposition stated in *Halsbury* or for the

17 2nd ed., 1795.

18 The 3rd Report of the Lords' Committee touching the Dignity of a Peer of the Realm, July 29, 1822.

19 1st ed., 1886, p. 73.

20 1st ed., 1844.

21 This was also the view of a Select Committee of the House of Commons which reported in 1894. The following year, Viscount Wolmer, M.P. for West Edinburgh, admitted he had succeeded to the Earldom of Selborne but claimed he was still a duly elected M.P. A Select Committee of the House of Commons reported the succession to the House of Commons and the same day a new Writ issued for a by-election at West Edinburgh, so that apparently the House of Commons accepted the conclusions of the 1894 Committee that succession to a peerage disqualified a person from sitting as an M.P. One may note that the 1894 Committee went against the views of the then Clerk to the House of Commons, Sir Reginald Palgrave.

22 3rd ed., Vol. 14, p. 11. The second sentence did not appear in the 2nd edition.

23 (1833) Cockb. and Rowe Election Cases, 37, 95.

24 Before 1868, when disputed elections became a matter for an Election Court consisting of two High Court judges, disputed elections were determined by an Election Committee of the House of Commons.

submission founded on it by Mr. Benn that on succession to a peerage the disqualification did not attach until the writ of summons had been issued. As McNair J. pointed out during the course of Mr. Benn's argument, the *Bedford (Borough) Case* would be more authoritative if the Committee had given reasons for its decision.[25] In its judgment, the Election Court referred to the later case of the *Earl of Beauchamp* v. *The Overseers of Madresfield*,[26] which was concerned with whether a peer who had actually taken his seat in the House of Lords was entitled to vote at a parliamentary election. The Election Court found it impossible to believe that the judges there could *per incuriam* have stated that peers were disqualified if they meant only to say that peers who had sat in the House of Lords were so disqualified. Furthermore, the Election Court pointed out that Viscount Birkenhead L.C. in *Viscountess Rhondda's Claim*,[27] citing three resolutions of the House of Commons in 1699, 1700 and 1802 as declaratory of the common law, had said that it was a high infringement of the liberties of the Commons for any Lord of Parliament or other peer to concern himself in the election of M.P.s.

The Election Court felt that the "consistent stream of authority" was to the effect that the status of a peer was a disqualification from sitting in the House of Commons. It was confirmed in its view by the belief that, since a peerage is inalienable, it would be strange if a peer were entitled by his own act in refusing to apply for a Writ of Summons to disembarrass himself of part of the attributes assigned by the common law to the incorporeal hereditament to which he had succeeded. Further, so long as the hereditary principle was maintained as part of the fabric of the Constitution, it would be wholly inconsistent with that principle that the successor to an hereditary peerage should have a free option as to which House he should sit in.

Mr. Benn had argued that without a writ of summons he had no right to a voice in the House of Lords and was not a lord of Parliament. Quoting from Coke's *Institutes*[28] that "whosoever is not a lord of Parliament and of the lords' house is of the house of commons, either in person or by representation . . .", Mr. Benn argued that, not having received a writ of summons, he was not a lord of Parliament, and, therefore, not disqualified from sitting in the House of Commons. The Election Court, however, said that Coke was not here drawing a

25 One may remark that neither did the Election Court give any reason for regarding the *Bedford (Borough) Case* as no authority for the statement in *Halsbury*. Perhaps it accepted Sir Andrew Clark's view that a writ of acceleration was analogous to creating a new barony by writ of summons and taking his seat—only when the son had both received the writ and taken his seat did he obtain his father's barony.

26 (1872) L.R. 8 C.P. 245.

27 [1922] 2 A.C. 339 at pp. 367–368.

28 Part IV, p. 1.

distinction between peers of the realm and lords of Parliament, but was emphasising that by acquiring nobility a person acquired a special status by virtue of his entitlement to a seat in the House of Lords. It was assumed that peers entitled to claim a writ of summons would do so. The court accepted that before the division between the two Houses, the writ of summons was everything but said that by at least the early nineteenth century, the writ, though the best evidence of succession, had ceased to be the only method by which the disqualification by status could be established.[29] In effect, the court treated the writ of summons, as Sir Andrew Clark had referred to it, as merely the " ticket of admission " to the House of Lords.[30]

3. *Court's Jurisdiction*

Mr. Benn had maintained that the Crown being the sole fountain of honour, questions of succession could be determined only by the Lord Chancellor or, in disputed cases, on a reference by the Crown to the Committee of Privileges of the House of Lords. Mr. Benn relied on the case of *Earl of Cowley* v. *Countess of Cowley*.[31] This was a claim for an injunction to restrain trespass to Lord Cowley's incorporeal hereditament, his dignity as a peer, the trespass consisting in his ex-wife (who had divorced him) continuing to call herself Lady Cowley. The House of Lords held that the nature and extent of the dignity could not be determined by a court of law. " The right to a peerage can only be tried before the peers," said Lord Macnaghten.[32] The Election Court, however, felt that the issue there was disturbance of the dignity held by Lord Cowley and no such issue arose here. Perhaps a stronger ground for the Election Court's rejection of Mr. Benn's submission is that if he were right, it would have been impossible for the court to determine the very question it was charged by statute with the duty of determining.

4. *Votes thrown away*

Evidence had been given before the Election Court that notices of Mr. Benn's disqualification were posted with Mr. St. Clair's election

29 Where, as in the case of a Scottish peerage, succession does not entitle the holder to sit in the House of Lords, the House of Commons declares a seat vacant on such evidence of the death of the predecessor and of the succession of the M.P. affected, as it thinks fit and sufficient. (Report of Select Committee of the House of Commons, para. 3—Parl. Paper, 1895, Commons, Vol. 10, p. 561).

30 Somewhat curious is the position of someone who successfully claims a peerage that has been in abeyance and is held to have succeeded to the peerage at a date before or during the time he was an M.P. Such was the position of Mr. H. J. Scrymgeour-Wedderburn, M.P. for West Renfrew 1931–45, who successfully claimed the Earldom of Dundee in 1953 and was held to have succeeded to it in 1924.

31 [1901] A.C. 450.

32 *Ibid.* at p. 456.

address to all electors in the constituency before the by-election and posters had been posted outside the polling stations to the same effect. Sir Andrew Clark had argued that where a candidate was disqualified by status (as distinct from corrupt practices during the election [33]), and notice was given to the electors of the disqualification, then any votes given for that candidate must be regarded as votes thrown away, and the candidate polling the most votes after discarding the votes thrown away must be declared elected. Judicial intervention during Sir Andrew's submissions indicated that the court was not impressed by cases like *R.* v. *Hawkins*,[34] where the candidate admitted he was disqualified by the Test Act, and *Gosling* v. *Veley*,[35] where the candidate was a woman. In *Benn's* case, the disqualification depended not on a pure question of fact but on a legal issue. However, the court felt bound by the Court of Appeal decision in *Beresford-Hope* v. *Lady Sandhurst*.[36] Lady Sandhurst had been declared elected a member of the London County Council, and the candidate with the next highest number of votes petitioned to claim the seat on the ground that Lady Sandhurst, as a woman, was disqualified and that notice of that fact had been given to the electors. The Court of Appeal upheld the petition, Lord Coleridge saying [37]: "It has been laid down over and over again, that if the fact exists which creates an incapacity, and it is known, and must be known, to those parties who voted for a candidate who is so incapacitated, votes given under those circumstances are thrown away."

With respect to the Election Court, it seems unreal to assert that *ignorantia juris neminem excusat* where the law as to whether a peer was disqualified in law was a matter of legal dispute, and had never been determined in a court of law. Perhaps the Election Court could have distinguished the case of *Beresford-Hope* v. *Lady Sandhurst* [38] on the ground that the disqualification of a peer in 1961 was not as obvious or notorious a disqualification as that of a woman in 1889. This would have enabled the court to declare the election void and to escape from the absurdity of having to declare Mr. St. Clair the duly

33 In *Drinkwater* v. *Deakin* (1874) L.R. 9 C.P. 626, a candidate had allowed his tenants to trap rabbits on his land before polling day so as to influence their votes, and notice of disqualification on the ground of corrupt practices had been given by his opponent before polling day. The election was held by the court to be void and a new election then held.

34 (1808) 10 East 211.

35 (1847) 7 Q.B. 406.

36 (1889) 23 Q.B.D. 79.

37 (1889) 23 Q.B.D. 79 at p. 94. This dictum of Lord Coleridge is inconsistent with his earlier statement, made in the course of argument by counsel in *Drinkwater* v. *Deakin* (1874) L.R. 9 C.P. 626, 629: "Voting for a 'dead man' or for a man obviously and notoriously disqualified, is a very different thing from voting for a man who proves to be disqualified after much doubt and argument upon the effect of complicated facts or legal inferences."

38 (1889) 23 Q.B.D. 79.

elected M.P. for Bristol South-East when he had by name been rejected at the by-election by a large majority. Never before has a candidate with a minority of votes in an English parliamentary election been seated as a result of an Election Petition.[39]

The Attitude of the House of Commons

Both on April 13, when the Report of the Committee of Privileges was to be discussed, and on May 8, after the Bristol South-East by-election result, Mr. Benn sought to be admitted to the House of Commons and heard, but on each occasion a Motion to this effect was defeated. On April 13, Mr. Gaitskell cited three precedents in favour of Mr. Benn, the first being that of Daniel O'Connell who had been returned as an M.P. in 1828 before the passing of the Roman Catholic Relief Act in 1829. O'Connell, as a Roman Catholic, refused to take the Oath of Supremacy but the House, without a Division, allowed him to address the House from the Bar before it proceeded to debate and reject his case. Second, Charles Bradlaugh, an atheist, elected M.P. for Northampton in 1880, was refused permission by the House of Commons either to take the oath or to affirm. He was, however, allowed by the House, without a Division, to speak not only in 1880, but again in 1881, 1882, and 1883. Thirdly, the Rev. J. G. MacManaway, a priest of the Church of Ireland, was elected for Belfast West in 1950. The question of his disqualification went before a Select Committee who referred it to the Judicial Committee of the Privy Council.[40] The Judicial Committee ruled that Mr. MacManaway was disqualified, yet during the debate on the Judicial Committee's Report, he was allowed to speak in the House and then withdrew.

Mr. Butler, arguing against allowing Mr. Benn to speak, said he had been heard already before the Committee of Privileges. That, of course, was true but Mr. Bradlaugh had also been heard by a Committee of the House, and the Rev. MacManaway had been heard by the Judicial Committee of the Privy Council. Moreover, Mr. Benn had not had any opportunity of commenting on the Report of the Committee of Privileges. Mr. Butler also urged that it would be a bad precedent to allow a petitioner to speak at the Bar, but as Mr. Grimond pointed out, the House is always competent to make up its mind which petitioners should be heard and which not. Mr. Butler dismissed the O'Connell and Bradlaugh precedents as irrelevant on

[39] In Northern Ireland, however, in 1955, Election Petitions were presented by the unsuccessful Unionist candidates in the Mid-Ulster and Fermanagh and Tyrone constituencies on the ground that the successful Sinn Fein candidates were disqualified as felons currently serving terms of imprisonment. The Election Court in each case held that the votes cast for the Sinn Fein candidates with knowledge of the facts were thrown away and that the petitioner was entitled to the seat.

[40] *Re MacManaway* [1951], A.C. 161.

the ground that they were M.P.s and Mr. Benn was not, and the MacManaway case was dismissed on the ground that in his case the law was not settled until the House declared the law at the end of the debate in which he spoke, whereas in Mr. Benn's case " the law was declared in 1895," alluding to the Report of the Select Committee of that year. This seemed to be a particularly weak line of argument because, of course, the House of Commons was in no way bound by the 1895 Report, and the present House had not yet decided whether to accept the Report of the Committee of Privileges. The very question of whether Mr. Benn was an M.P. had not yet been determined by the House, and Mr. Butler's argument prejudged that issue.

Refusal by the House of Commons to hear Mr. Benn and the inadequate reasons advanced for such refusal must surely have injured the reputation of the House for generosity, courtesy and fair play. It is to their credit that some dozen Conservative M.P.s voted against the Government on the issue.

On May 8, after Mr. Benn's by-election victory, the House of Commons again rejected a Motion that he be admitted and heard. Mr. Butler again presented the case against his admission and, in addition to his earlier arguments, pointed out that the matter having been referred to the Election Court, was now *sub judice*. Against this, it was said that the Rev. MacManaway had been allowed to speak in the House of Commons although his case was being considered by the Judicial Committee, and Mr. George Rogers, M.P. for North Kensington, had continued to sit in the House after the 1959 General Election although an Election Petition had been presented against his return by Sir Oswald Mosley, one of the unsuccessful candidates in that constituency.[41] The Attorney-General, however, said that there was no precedent for allowing someone to sit where the House itself had already determined that he was disqualified. This latter argument clearly put the Government on stronger ground on May 8 for rejecting Mr. Benn's claim to sit than it had been on April 13. But again it is difficult to avoid the conclusion that the reputation of the House was being sullied. During the debate, Mr. Chuter Ede quoted some apt words from a speech of Lord Hugh Cecil in 1923 [42]:

> " Any student of Parliamentary history must be aware that whenever the House has entered into long and embittered conflict with individuals it has never conduced either to the dignity or the authority of the House. These conflicts have occurred very frequently in the history of the House of Commons, and I think I am right in saying that in no single instance has the House of

41 The petition was dismissed by the Election Court: [1960] 1 W.L.R. 762.
42 Official Report, July 31, 1923; vol. 167, c. 1318.

Commons come out of the conflict with individuals without discredit."

The Constitutional and Political Implications

The Election Court pronounced the hereditary system to be part of the fabric of the Constitution. The democratic system of election to the House of Commons is also part of the fabric of the Constitution. In *Benn*'s case, these two principles were in conflict. One of Mr. Benn's arguments had been that if an M.P. succeeds to a peerage, the normal duty of a peer to apply for a writ of summons to take his seat in the House of Lords gave way to a prior duty to his constituents to continue to represent them in the House of Commons. The conflict of duty must, he maintained, be resolved in favour of service in the House of Commons since, in 1961 at any rate, the House of Commons was undoubtedly the more important constitutionally of the two Houses. At no point in the Election Court's judgment is this argument discussed, but the effect of the judgment, backed as we have seen by ample authority, is that the hereditary principle prevails over the democratic. Constituents are deprived of their choice solely because of the hereditary system.

There is little doubt, from the evidence of public opinion polls, or from the statements of so many people and newspapers of widely different political views, that the law as established by the Election Court is generally regarded as anomalous and thoroughly out of accord with the needs of a modern democracy. The *Benn* case has brought this dissatisfaction into the open—it obtained considerable publicity, it led the Government to announce on April 26 the setting up of a Joint Select Committee on the composition of the House of Lords, and by ending in Mr. St. Clair entering the House of Commons as " the Member for Bristol South-East " has probably brought a change of the law nearer.

What of the future? The main stumbling-block in the way of a simple change in the law allowing a peer to renounce completely his peerage, and thus be eligible to vote and be elected to the House of Commons, is the Government's view that the problem should only be dealt with on " a broad canvas," that is, in the course of considering generally the composition of the Lords. Mr. Butler has spoken of the danger of pulling bricks out of the structure of the Constitution, of the danger of piecemeal reform. The trouble is that the chances of all-Party agreement on the broad question of the composition of the House of Lords, especially when powers are not to be discussed, are slim. The Labour Party fears that a Second Chamber, with a modernised composition, might be tempted to use powers that are

now in desuetude, and that its influence would be enhanced at the expense of the Commons.

Behind the Government's caution on this issue is, no doubt, the belief that the hereditary system does essentially impose both duties and privileges, and it may not long survive if a peer is free to renounce his peerage.[43] In favour of a simple change in the law is that it would end an obvious anomaly. Why should peers be grouped with felons and bankrupts? At least felons can in due course be freed and bankrupts discharged, yet under the present law, a peer cannot renounce his peerage. Not only would a change in the law enable a number of M.P.s (all at the moment on the Conservative side) to continue as M.P.s even after they succeed to the peerages to which they are now heirs, but would end the anomaly that even those Scottish peers who are not chosen as representatives to the House of Lords cannot sit in the Commons either,[44] and the anomaly that hereditary peeresses cannot sit in either house.[45] The Life Peerages Act, 1958, was piecemeal reform that modified the hereditary principle, but the innovation then introduced can hardly be said to have damaged the Constitution. If it is said that the House of Lords would lose promising material if M.P.s succeeding to peerages were allowed to renounce them, one can leave the last word with *The Times*[46]: "What are life peers for if not to make up for the deficiencies of the hereditary system?" The case for a change in the law, allowing for the renouncing of peerages, is surely made out.

[43] As one Conservative journalist has put it more cynically: "If one hereditary peer is free to divest himself at will of his nobility, how can this avoid making other hereditary peers who wish to keep their titles look rather foolish?" (Peregrine Worsthorne, "The Reporter," July 6, 1961).

[44] Mr. St. Clair is himself heir to a Scottish peer, Lord Sinclair.

[45] The Committee of Privileges of the House of Lords in *Viscountess Rhondda's Claim* [1922] 2 A.C. 339, ruled that an hereditary peeress cannot sit in the House of Lords, and since the Election Court in *Benn*'s case held that the status of peerage disqualifies from sitting in the Commons, it must be taken as clear law now that an hereditary peeress cannot sit in the Commons.

[46] *The Times*, leading article, July 29, 1961.

RISE OF THE PUBLIC CORPORATION IN INDIA: SOME CONSTITUTIONAL ASPECTS

R. S. Arora

Two world wars and between them a world-wide economic depression completely changed accepted notions of the functions of the state. Economic and social welfare became placed on the top of the "Agenda" of every positive state, including those (popularly known as underdeveloped ones) which have recently achieved their political independence. To help accomplish their new aims governments have resorted extensively to the device of the public corporation, which Professor W. A. Robson reiterates to be one of the most significant institutional innovations of our time.[1] To Van Dorn it appears to offer an almost unlimited possibility of expansion of government activities without consequential paralysis from excessive complexity.[2] Marshall Edward Dimock calculates that almost all the new ventures in public ownership since 1900, the world over, have taken the corporate form.[3] It may be remarked that no institution has ever developed so rapidly and so widely during the twentieth century as has that of the public corporation.

In India, until 1947, the British rulers made very little use of the corporation as an agency for administering the economic and social functions of the state. The public corporation in its modern form originated in the Bombay Port Trust (1879), for the administration of the affairs of the Port of Bombay. Since the Trust did remarkably well, similar port authorities were created for Calcutta in 1890 and for Madras in 1905—two other big sea-ports of India. After the appearance of these early port trusts, this institution was not tried till the Reserve Bank of India was established in 1934 to preside over the currency and credit system of the country. The Government of India

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1 W. A. Robson, "The Progress of Socialisation in England," *Foreign Affairs*, (1933) p. 511; "The Public Service Board" in W. A. Robson (ed.), *Public Enterprise*, (1937) p. 359; *Problems of Nationalised Industry*, (1952) p. 366; "The Administration of Nationalised Industries in Great Britain," *Public Administration Review*, (1947); Nationalised Industry and Public Ownership, (1960) p. 493.

2 H. A. Van Dorn, *Political Science Quarterly* (1939) p. 469.

3 M. E. Dimock, "These Public Corporations," *Harper's Magazine* (1945) p. 570.

Act, 1935, contained a fully-fledged constitution for the establishment of the Indian Railways Authority [4] based on the model of recently created British corporations and boards. Despite the support of the Wedgwood Railway Enquiry Committee (1937),[5] this part of the Government of India Act, 1935 was never translated into action by the Imperial Government.

In 1947, India became free after being under alien rule for over 800 years first by the Mughals and later the British. Soon after independence, in April, 1948, the Government came out with their statement on industrial policy. It was clearly declared in the statement [6] that "the state has the inherent right to acquire any existing industrial undertaking whenever the public interests require it. . . . The management of state enterprises will, as a rule, be through the medium of public corporations under the statutory control of the Central Government, who will assume such powers as may be necessary to ensure this." Since independence, under the Nehru Administration a series of public corporations have appeared in India for administrative, fiscal, relief and reconstructive purposes.

Indubitably, such rapid development of the public corporation as an administrative agency raises important legal [7] and constitutional problems. It is proposed in this article to consider some constitutional aspects of the present colossal activities carried on through public corporations in India. An attempt will be made to evaluate: the constitutional basis of economic activities of the state in India; the constitutional competence of Indian legislative bodies to create public corporations; the constitutional and legal significance of the problem

4 Government of India Act, 1935 (26 Geo. 5, c. 2).

5 Railway Enquiry Committee Report, 1937, Chapter XV.

6 Government of India, Statement of the Industrial Policy, April 6, 1948.

7 There are a good many problems of a legal nature. These problems cannot be discussed within the scope of the present article, other than to point out the more significant questions which arise: Is a corporation created by and performing functions of the Government to be looked upon as an entity distinct from the Government; or is it to be regarded as an instrumentality which, despite its corporate form, shares the legal status of the Sovereign, wholly or partially? Should a conspiracy or a fraud against a public corporation be treated as a conspiracy or a fraud against the state? Is a public corporation as much entitled to immunity from giving discovery as any proper department of the state? What should be the legal relationship between public corporations?

See R. S. Arora, "Constitutional and Political Aspects of the Public Corporations in Britain and India" (unpublished thesis for Ph.D. degree, University of London, 1961); Oliver P. Field, "Government Corporations: A Proposal," *Harvard Law Review* (1935); W. Friedmann, "The Legal Status and Organisation of the Public Corporation," *Law and Contemporary Problems* (1951); "Legal Status of Incorporated Public Authorities," *Australian Law Journal* (1948); J. A. G. Griffith, "Public Corporations as Crown Servants," *University of Toronto Law Journal* (1952); H. Pinney, "The Legal Status of Federal Government Corporations," *California Law Review*, (1939); W. R. Stocke, "Some Aspects of the Legal Status of Federal Corporations," *Georgetown Law Journal* (1938); Ya-F. Mikolenko, "When State Corporation Sues State Corporation," *Current Digest of the Soviet Press*, December 22, 1951.

of compensation to disappropriated persons; and the constitutional status of the Minister *vis-à-vis* the public corporation and parliament.

I

To serve as a background for later constitutional discussion, a summary of the recent public corporations seems appropriate at this place. The first public corporation established by the Nehru Government was the Rehabilitation Finance Administration set up in March 1948 for the purpose of giving financial assistance on reasonable terms to displaced persons to enable them to settle in business or industry.[8]

The Damodar Valley Corporation Act of 1948 created a body corporate by the name of the Damodar Valley Corporation for the development of the Damodar Valley and River in the states of Bihar and West Bengal. The River Damodar has earned notoriety for its destructive propensities; it erodes Bihar and floods Bengal—with water and with sand—and causes much distress and loss in both the states. So much so that it has been aptly styled "the river of sorrows." For more than half a century, the Government has been contemplating how to teach the river to walk instead of running. Ultimately, in 1948 the Damodar Valley Corporation (the D.V.C.) was created keeping in view the T.V.A. as a model.

The Industrial Finance Corporation created in 1948 by an Act of Parliament [9] for the purpose of making medium and long-term credits readily available to industrial concerns in India is a queer type of public corporation. It is a body corporate having perpetual succession and a common seal, with a power to acquire, hold and dispose of property, both movable and immovable, and to sue and be sued by its name. In regard to its finances, the Central Government and the Reserve Bank of India each subscribe up to 20 per cent. Insurance companies, investment trusts, banks and other financial institutions subscribe the rest. According to the terms of the Act, the Central Government although it holds only 20 per cent. of the stocks of the Corporation guarantees all the shares.

By section 3 of the Act of April 19, 1948, the Government of India created a body corporate by the name of the Employees' State Insurance Corporation to provide certain benefits for employees in case of sickness, maternity and employment injury, etc. A new brand of Board of Directors was provided for this corporation, whereby the Minister of Labour in the Central Government shall be an *ex-officio* chairman and the Minister of Health in the Central Government shall be an *ex-officio* vice-chairman and other members of the Board shall be from various institutions.[10]

[8] The Rehabilitation Finance Administration Act, 1948.
[9] The Industrial Finance Corporation Act, 1948.
[10] The Employees' State Insurance Act, 1948, s. 8.

India with all her rich hydro-electric resources, at the time of independence, was far behind in the matters of generation and consumption of electricity. Realising that, for a uniform expansion of electric power, India will have to follow the adoption of a "grid" system, broadly speaking the pre-war British policy towards the British electricity industry, by the Act of September 10, 1948,[11] the Central Government of India was authorised to constitute a body called the Central Electricity Authority and the State Governments were empowered to constitute State Electricity Boards for their respective states.

The Reserve Bank of India was nationalised in 1948.[12] In fact the demand for its nationalisation was older than the Bank itself. Most of the provisions in the Reserve Bank (Transfer to Public Ownership) Act, 1948 followed the corresponding provisions in the Bank of England Act of 1946 and its administration and management were entrusted to a corporate body.

The nationalisation of Civil Aviation in India in 1953 was more or less based on similar reasons as the nationalisation of Civil Aviation in Britain in 1939. An Act was passed in 1953 to establish two public corporations: one to handle the inland service (*i.e.*, the Indian Air-Lines), and the other to work for the international service (*i.e.*, the Air-India International).[13]

The Imperial Bank of India, established by a statutory Act in 1920, was in importance second to the Reserve Bank of India in the monetary field and was acting as an agent of the Reserve Bank of India where the latter had no branches. The intentions to nationalise the Imperial Bank and the Reserve Bank were made known at one and the same time. So the Bank was virtually waiting for its turn which occurred in 1955, when the State Bank of India took over the responsibility of the Imperial Bank of India.

According to the protagonists of free enterprise the nationalisation of life insurance by means of an ordinance issued by the President of India in January 1956 came like "a thief in the night." On the other hand, the official account in favour of this step states that considerable dishonesty in the business of life insurance was being noticed for some time and before nationalisation prima facie, the existence of malpractices in some Indian insurance companies had been established and the industry was not desirous of making any effort to put its house in order. The Life Insurance Corporation Act, 1956 which followed the ordinance provided that the Central

11 The Electricity (Supply) Act, 1948.
12 The Reserve Bank of India (Transfer to Public Ownership) Act, 1948.
13 The Air Corporations Act, 1953.

Government may, by notification in the official gazette, establish a corporation to run the life insurance business in India.

Each corporation in India has been created by a proper Act of Parliament providing for its board of directors, its own plant and property which it will possess in its own name; its own revenues and expenditure system, its distinct accounting and reporting system; its own well-defined sphere of activities. Each corporation has been given the status of a separate entity for legal purposes and can sue and be sued, can enter into contracts and acquire property in its own name. Each of them is accountable to Parliament through the appropriate Minister who enjoys specific and general powers including the power to issue directives of general character.

II

The basic question of great constitutional significance regarding the public corporation in India is: Does the Act or Charter establishing a public corporation have a proper constitutional basis? The problem can also be put in another form: For what purpose(s) can Parliament in India create a public corporation?

Usually it is remarked that the structure of the Indian Constitution is characteristically British.[14] This is a statement which ought to be accepted with certain reservations. For instance, the Indian Constitution makes the federal government and legislature one of limited and enumerated powers. The legislative powers of the British Parliament are legally unlimited. Its supremacy enables it to make any law it thinks fit and the question whether a law passed by it is beyond its competence cannot arise. Where a court finds a later law inconsistent with a former law of the British Parliament, the later law is allowed to prevail. In Dicey's words: "The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament has, under the English Constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[15] This means that *ultra vires* is a phrase which cannot be used by English courts with regard to any Act of the United Kingdom Parliament. The courts in England have no authority to act as regents over what is done by Parliament with the consent of the Queen, Lords and Commons. Sir Ivor Jennings has described this supreme legal power of Parliament as: "Thus Parliament may re-model the British constitution, prolong its own life, legislate *ex-post-facto*, legalise illegalities, provide for individual cases, interfere with contracts and authorise the seizure of property,

[14] M. C. Setalvad, *The Common Law in India* (1960) p. 168.
[15] A. V. Dicey, *Law of the Constitution*, 9th ed., pp. 39–40.

give dictatorial powers to the government, dissolve the United Kingdom or the British Commonwealth, introduce Communism or Socialism or Individualism or Fascism, entirely without legal restriction." [16]

The fundamental reason for British Parliamentary supremacy is that the British Constitution is a historic growth in the sense that it has evolved continuously without any revolutionary changes to necessitate its restatement in a single instrument establishing a constitution to include all rules which, directly or indirectly, effect the distribution or the exercise of the sovereign power in the State. In fact, it is the flexibility of the British Constitution which has enabled the British Parliament to adjust governmental institutions to the needs of the society.

In view of this background of British constitutional law, there could be no constitutional difficulty for any British Parliament to transfer from private to public ownership such essential industries as coal, transport, gas, electricity, etc., and to establish corporate boards for the Bank of England and atomic energy and to devise various methods of imposing state control over social services such as medical and hospital treatment. In view of the immense legislative powers of the British Parliament, it should not be surprising to think that any act or charter nationalising any private enterprise, profession, business or trade and establishing a public corporation to operate and manage the affairs of such enterprise cannot be declared unconstitutional or *ultra vires*. Therefore, any such purpose for which the corporation is to function is within the express or implied powers of the Government since there are no limitations whatsoever, other than moral. So much so, there is no declaration or definition of fundamental right in the British Constitution to check the progressive activities of the state.

The situation is different in the case of India. India has to pass from the stage of a monarchy to republicism and federalism (or quasi-federalism, as it is sometimes described), and has a documented constitution of enumerated powers. At the outset of this part of the discussion it is essential to bear in mind some relevant features of the Indian Constitution. Firstly, the distribution of legislative powers in the Indian Constitution has certain peculiarities of its own which are not usually found in other written constitutions. Unlike other constitutions it attempts to elaborate all possible subject-matters of legislation and the lists have been made as exhaustive as possible. Apart from the Union List and State List there is a Concurrent List of significant length. Moreover, the distribution of legislative powers only applies

[16] Ivor Jennings, *The Law and the Constitution*, 4th ed., p. 142.

as between the Union on the one hand and the states on the other. In the territories the Union power is supreme.

Secondly, the founding fathers constituting India as a sovereign democratic republic also constituted it what is popularly known as the "welfare" or the "social service" state.[17] Understanding the nature and significance of the modern state, they enshrined the rights of the community in Part IV of the Constitution under the heading "the Directive Principles of the State Policy" in Articles 36–51.[18] According to Article 38, the state is directed to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.[19] The state was further to secure (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength.[20] Of course, it is a part of the Constitution that these directive principles shall not be enforceable by any court. Nevertheless, they are "fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."

Thirdly, the fundamental rights have been expressly laid down in Part III of the Constitution. Articles 14 to 31 assure the citizens of India equality before the law, prohibition of discrimination, equality of opportunity in public employment, guarantee of freedom of expression, movement, association, assembly, residence; freedom to acquire, hold and dispose of property; and the freedom of personal

[17] See Preamble to the Indian Constitution; also see C. S. Subramania, *Planning the Indian Welfare State* (1954).

[18] It seems that the framers of the Indian Constitution were in this respect influenced not only by the Gandhian philosophy but also by the Constitution of the Irish Republic, Constitution of Republican Spain, the Charter of the United Nations and by the Universal Human Rights Charter. (See Sir Ivor Jennings, *Some Characteristics of the Indian Constitution* (1953); M. V. Pylee, *Constitutional Government in India* (1960) pp. 306–307; "Declaration of Fundamental Rights of the People" a resolution moved by Gandhi, in the forty-fifth session of the Indian National Congress held in Karachi in 1931; M. K. Gandhi, *The India of my Dreams* (1949), compiled by R. K. Prabhu).

[19] This Article is a reiteration of the Principles of the Constitution enumerated in the Preamble, and also resembles Clause (1) of the Article 45 of the Constitution of Eire, 1937, except that the word "charity" has been omitted in the Indian Article.

[20] Constitution of India, Art. 39.

liberty. There can be no deprivation of personal liberty except by the procedure established by law, nor can there be any acquisition of property without compensation. It must be kept in mind that these fundamental rights guaranteed to the individual are not absolute rights. They are necessarily qualified or restricted by law in the general public interest. The Indian Constitution is very much surrounded with provisos and *non-obstante* clauses. The insertion of fundamental rights in the Constitution of India seems to be a deliberate departure from British constitutional concepts in order to limit parliamentary sovereignty. These features of the Indian Constitution make it essential to discuss along with our opening proposition some other allied issues. For instance, (a) whether the state could create, having regard to the terms of the constitution, an absolute monopoly of any business; (b) how far the Indian Constitution empowers the legislative bodies to make laws with respect to the acquisition of private property. It should not be irrelevant to make clear that power to create a monopoly in favour of the state must come before the question regarding the competence to create a public corporation to operate a public enterprise. Nevertheless both the measures are means to the same end which is the establishment of a socialist society and welfare state in India. It is simply a question of priorities.

The provisions of the Constitution relating to the acquisition of property by the state, or in pursuance of a state Act, are Articles 19, clause (6); 31; 31A; and 31B.[21]

The original Article 19 provided by clause (6) that: "Nothing in sub-clause (g) of the said clause (*i.e.*, clause 1)[22] shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the state from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

The original Article 31 provided by clauses (1) and (2) that: "No person shall be deprived of his property save by authority of law," and (2) "No property, movable or immovable; including any interest

[21] Art. 19, clause (6) was amended, and Articles 31A and 31B were inserted after Article 31 in 1951; see Constitution (First Amendment) Act, 1951. Article 31, clause (2) and Article 31A were amended in 1955, see Constitution (Fourth Amendment) Act, 1955.

[22] Art. 19, clause 1 (g) reads: "All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business."

in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

The above quoted constitutional provisions had to be amended later on since the question was raised whether the state was competent to create a monopoly in favour of itself or of a corporation owned or controlled by the state, since Article 19 (1) (g) grants every citizen the right to carry on any trade or business. The right would obviously be impaired if the state itself seeks to carry on a trade or business ousting private traders from that trade, wholly or partially.

The complexity of the situation was first realised by the Government of India [23] in this respect in view of the judgment of the Allahabad High Court reported in 1951 A.I.R. (Allahabad) 257, Full Bench, known as Motilal *versus* the Government of Uttar Pradesh. The issue involved in this case was that the Government of Uttar Pradesh wanted to nationalise the transport service in the state. The State Government had the power under the Motor Vehicle Act, 1939, to regulate the vehicular traffic on the roads. This authority was exercised by introducing the permit system. The U.P. Government had a scheme of nationalisation of motor transport. The Government proceeded with their scheme piecemeal, territory by territory; certain territory they had said would be subject to their monopoly and no private individual would be entitled to run buses within that territory. In doing so, they said that it would not be necessary for the state to obtain a licence for the running of their buses within the territory that they had earmarked for themselves, but required the private owners to obtain licences from the state. This question was raised before the Allahabad High Court on the ground that the step taken by the state government involved discrimination.

Counsel for the petitioner argued that under the Indian Constitution an individual has absolute liberty to carry on any profession, business or vocation and that nationalisation in any form is not permissible. This means the Indian Constitution perpetuates *laissez-faire* values in their pure and simple form. It was strenuously argued that Article 19 (i) (g) along with some other Articles absolutely prohibit the state from embarking on any nationalisation venture. As far as this particular case under discussion is concerned the Allahabad High Court held that no monopoly could be created either in favour of the

[23] Statement of Mr. Nehru in Lok Sabha during debates on second reading of Constitution (First Amendment) Bill, 1951, May 18, 1951, col. 9085.

state or in any other person save by Act of Parliament and the Act would have to be justified as reasonable under the original provision of Article 19 (6) of the Constitution. It is submitted that the court gave the right decision, because U.P. Government had no proper authorisation to nationalise the public transport service.

However, this sort of judicial interpretation of the Constitution of India demonstrated the possible conflict between the " Fundamental Rights " of the individual and the " Directive Principles of State Policy," since the " Rights " encourage individualism and the " Directives " point towards Socialist society and both are parts of the same constitution.

The " Fundamental Rights " have been outlined in Part III of the Constitution and the " Directive Principles " have been provided in Part IV. Ordinarily, there may not be any conflict between the two and at least theoretically there will not be any conflict between the two parts of the Constitution when the ideal of a welfare state is achieved because at the time when the socialist society envisaged in the Constitution is attained then any measure adopted for the benefit of the society would automatically be for the benefit of the individual too. Also in a socialistic state, an individual shall be in no better or worse conditions than the society of which he is an integral part. But, during the transitional period, the interests of the society are, sometimes, bound to clash with the interests of the individual. Hence the question arises: In a situation of crisis when the " Directive Principles " clash with the " Fundamental Rights " should " Directives " prevail over the " Rights " or the " Rights " over the " Directives "?

Views differ about the significance and status of the " Rights " and the " Directives." Some courts draw upon one aspect and others upon the other. One view is that as and when a Directive Principle is implemented by the state with a view to securing the interest of the community as such and in so doing violation of a fundamental right should result, consistent with the democratic ideal which assures to the individual his dignity and other cherished human values, the Fundamental Rights in question will prevail over the Directive Principle that clashes with it.[24] This view gets support from the observation of Das J. in the *State of Madras* v. *Champakam Dorairajan*[25] which states that the chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any executive or legislative Act or order, except to the extent provided in the appropriate

[24] See N. Arunachalam, " The Individual Under the Indian Constitution," *Supreme Court Journal* (1959) p. 69. Also see N. C. Chatterjee's Statement, Constitution (Fourth Amendment) Bill, Lok Sabha Deb. April 11, 1955, col. 4890.

[25] (1951) S.C.J. 313: (1951) M.L.J. 621: (1951) A.I.R., S.C. 226.

Article in Part III. Therefore, it was maintained that the Directive Principles of State Policy have to conform to and run as subsidiary to the chapter of Fundamental Rights. Mr. D. D. Basu tends to accept this position in his commentaries on the Constitution of India. He says: "When all is said, a detailed treatment of the Directives would be out of place in a judicial commentary inasmuch as they are non-justiciable. No court would be entitled to declare any legislation as invalid on the ground that it does not conform to the spirit of any of the Directive Principles." [26] Some protagonists of the Fundamental Rights have gone still a step further to call these "Directives" a set of "new year resolutions," [27] or "declarations of a purposeless piety," [28] or "a cheque on a bank at the convenience of the bank." [29] To Professor K. C. Wheare and to Sydney D. Bailey they are not more than "a mere political manifesto without any legal sanction." [30] Sir Ivor Jennings notices the ghosts of Sidney and Beatrice Webb stalking through these pages.[31] Some writers suggest *en bloc* repeal of this part of the Constitution.[32]

On the other hand, there is a fascinating example in *State of Bihar* v. *Kameswar Singh*, where the Supreme Court of India has used the Directive Principles to guide the Bench in determining one crucial question on which the constitutionality of an important statute, the Bihar Land Reform Act, hinged. One of the important points at issue in that case was that the statute was invalid inasmuch as there was no "public purpose" to sustain the acquisition of lands. Mr. Justice Hahajan opined that "the Act could not fail merely because it fails to postulate a public purpose." Under Article 39 which deals with the Directive Principles it is obvious that the concentration of big blocks of land in the hands of a few individuals is contrary to the principles on which the Constitution of India is based. The purpose of acquisition contemplated by the Act therefore is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to distribute the ownership and control of the material resources which come into the hands of the state, so as to subserve the common good as well as possible.[33] In the same case, Justice Das met the objection thus: ". . . In the never-ending race the law must keep pace with the realities

[26] D. D. Basu, *Commentary on the Constitution of India* II, p. 231.
[27] For the views of Mr. Nasirudin, see (1953) M.L.J. 9 (11).
[28] (1951) S.C.J. 313; A.I.R. (1951) S.C. 226.
[29] For the views of Mr. K. T. Shah, see (1953) M.L.J. (Journal) 9, 11.
[30] K. C. Wheare on *India's New Constitution*, C.W.N. iii (LIV), 1954; Sydney D. Bailey, *Parliamentary Government in Southern Asia* (1953) p. 38.
[31] Sir Ivor Jennings, *Some Characteristics of the Indian Constitution* (1953) p. 31.
[32] See for instance, Mr. Anantanarayanan, "Some Juristic Norms and the Indian Constitution," *Indian Year Book of International Affairs*, Vol. V, 1956, p. 109.
[33] (1952) S.C.J. 354: A.I.R. (1952) S.C. 252.

of the social and political evolution of the country as reflected in the Constitution. If, therefore, the state is to give effect to these avowed purposes of our constitution we must regard as a public purpose all that will be calculated to promote the welfare of the people as envisaged in these Directive Principles of State Policy, whatever else that expression may mean. . . . We must not read a measure implementing our mid-twentieth century Constitution through spectacles tinted with the early nineteenth-century notions as to the sanctity or inviolability of individual rights." [34]

In our opinion, whatever may be the differences of opinion between the Bar and the Bench or between the judges on these constitutional aspects, one thing seems to be pretty clear: that we cannot afford to overlook the significance of either part of the Constitution. Whereas the Fundamental Rights are, in effect, injunctions prohibiting Government from doing certain things, the Directive Principles are affirmative instructions to Government to do certain things.[35] These Directive Principles of State Policy represent a dynamic move towards a certain objective—the Fundamental Rights represent something static, to preserve rights which exist. But somehow and sometimes it might so happen that dynamic movement and that static standstill do not quite fit into each other. On such occasions if Directives are to be considered as subordinate to the Fundamental Rights, to treat them as a cheque on a bank at the convenience of the bank would mean that every progressive piece of legislation must clash with one fundamental right or another, and the ideal of a Socialist state envisaged in the Constitution simply can never be achieved. In other words, this would mean that we still hesitate to place welfare functions of the state at the top of the agenda of the state although we do agree that the nature and significance of the state has changed. A dynamic movement towards certain objectives necessarily means certain changes taking place; that is the essence of movement. And in the process of dynamic movement certain existing relationships are bound to be varied, altered or affected. In fact, they are meant to affect those settled relationships and yet if we come back to the fundamental rights they are meant to preserve, not indirectly, certain settled relationships. In such a delicate situation, if the static element is over-emphasised, as it had been sometimes by some courts, the result would be that the whole purpose behind the Constitution which was meant to be a dynamic Constitution leading to a certain goal, step by step, is hampered and hindered. Professor Gledhill believes that it would be superficial to dismiss these precepts as good resolutions fit only for paving stones on the broad

[34] (1952) S.C.J. 354; A.I.R. (1952) S.C. 252, at 290.

[35] Alan Gledhill, *The British Commonwealth*, Vol. 6, p. 161; also see his "India's Fundamental Rights," *Indian Year Book of International Affairs*, Vol. I, 1952, pp. 9–19.

and primrose-strewn way.[36] These "Directives" were, in fact, provided in the Constitution by the framers "to serve as beacon lights guiding state and other authorities in their movement towards building a welfare state."[37] As Dr. Ambedkar put it: "The Directive Principles are like instruments which were issued to the Governor-General and the Governors of the colonies and to those of India by the British Government under the 1935 Government of India Act. What is called the Directive Principles is merely another name for instrument of instructions. The only difference is that they are instructions to the legislature and the executives. Whoever captures power will not be free to do what he likes with it. In the exercise of it he will have to respect these instruments of instructions which are called the Directive Principles. He cannot ignore them."[38]

No doubt, the Fundamental Rights are justiciable whereas the "Directives" are not, but justiciability can never be the test of superiority. Mr. K. Narayana Rao argues that the absence of judicial enforcement does not deprive Part IV (Directives) of its legal character just as Article 361, which says that the President is not "answerable to any court for the exercise and performance of the powers and duties of his office, does not eliminate the legal character of the duties imposed on the President."[39] For instance, in 1776 the preamble to the American Declaration of Independence said that it was self-evident that all men were created equal, endowed with inalienable rights to life, liberty and the pursuit of happiness and that governments derived their powers from the consent of the governed for the purpose of securing these rights. The influence of these words upon American social and political development has been considerable but they are not enforceable in a court of law. In the case of India, it would be as improper if the courts adopted an attitude that Part III was superior to Part IV as if the Executive or Parliament were subordinate to courts. Whatever be the significance of fundamental rights, the rights of the society must not be ignored or subordinated. Therefore, we think, any measure nationalising any enterprise which satisfies the following three tests should be treated as constitutional and *intra vires*: First, the Act should be reasonable; secondly, it must be for a public purpose; and thirdly, it must provide for compensation for the property so taken or acquired.[40]

As far as the first test (*i.e.*, reasonableness) is concerned, the Lok

[36] Alan Gledhill, *op. cit.* p. 161.
[37] M. C. Setalvad, *The Common Law in India* (1960) p. 221.
[38] Constituent Assembly Debates. Also see *Om Parkash* v. *State of Punjab*, A.I.R. (1951) Pb. 93.
[39] See K. Narayana Rao, "The Indian Directive Principles—A Case for New Interpretation," *The Indian Year Book of International Affairs*, 1959, Vol. VIII, p. 112.
[40] Constitution of India, Art. 31 (2).

Sabha had to pass the Constitution (First Amendment) Act, 1951 to clarify the jurisdiction of the court and of the Lok Sabha. In view of various judicial interpretations of the Constitutional provisions, the Government realised the existence of some lacunae. Through this Act the state has been exempted from the condition of reasonableness, by laying down that the carrying on of any trade, business, industry or services by the state would not be questionable on the ground that it is an infringement of the right guaranteed by the Constitution. Obviously, this constitutional amendment enhances the powers of the legislature and proportionately limits the jurisdiction of the judiciary.

So far as the existence of " public purpose " is concerned: what are and what are not " public purposes " is a multi-dimensional problem. We must constantly keep in view that the phrase " public purpose " has to be construed according to the spirit of the time in which particular legislation is enacted. Again it is not for the court to impose upon any parliamentary body any political doctrine as to what are and what are not public functions, or to attempt the impossible task of distinguishing, within the functions of government, between essential and non-essential or between normal and abnormal. There is no sure basis for such a distinction.[41] Therefore, when the legislature declares that there is a public purpose behind the legislation, it would be highly desirable to respect its words.[42] In the case, *State of Bihar* v. *Kameshwar* it was maintained by Mahajan, Mukherjee, and Das JJ. that " a legislation made for the purpose of carrying out a Directive Principle of State Policy must be held to be one for a public purpose." [43] The third test being controversial needs separate discussion which will be undertaken later on in this article.

Upon reflection we gather that in spite of the fact that there is a parliamentary government in India, Wade and Phillips' statement that " a system of Parliamentary Government involves the supremacy of Parliament " is not applicable without certain qualifications.[44] In India the powers of the Union Parliament and state legislatures are not unlimited. There are some constitutional limitations and sometimes these limitations if taken too far might take the turn of a constitutional crisis—when the Fundamental Rights guaranteed by the Constitution conflict with some progressive social or economic measure passed by a legal parliament or state legislature. On such occasions much would depend upon the interpretation given by the judicial branch. Unfortunately so far, there have been many

41 See " Litigation with Nationalised Industry," *Law Journal*, June 14, 1946, p. 312
42 *State of Bihar* v. *Kameshwar*, A.I.R. (1951) Pat 91, F.B.
43 *Ibid*. paras. 19, Mahajan, J.; 29, Mukherjee, J.; 57, Das J.
44 Wade and Phillips, *Constitutional Law*, p. 32.

conflicting decisions given by the courts on such issues. The main purpose of the Constitution (First Amendment) Act, 1951, and of the Constitution (Fourth Amendment) Act, 1955, was to clarify the jurisdiction of the courts and of the legislative bodies. Still in a democratic state working under a documented constitution, whether by reason of faith or by reason of definition, in either case, many measures remain in the last resort capable of only arbitrary solution. And the arbiter may be the judiciary. If so, the only precaution must be to ensure that the state should not become the slave of a judicial oligarchy. For this it must be ensured that the members of the judiciary are experienced enough and have a wide enough vision to resolve the conflict fairly. Such words are admittedly vague and imprecise but this is a consequence of the nature of the dilemma. The problem is one of the selection of the arbiters.

III

A relatively simpler question of constitutional importance is: To what extent are Indian legislative bodies competent to create public corporations to operate public enterprises? In the British Constitution, as we have seen, Parliament is wholly free to decide to nationalise an enterprise or to create a public corporation to operate a public enterprise, whereas the position is rather qualified in India. Measures to nationalise an enterprise must be within the express or implied powers of the Government. For any such constitutional measure there is no constitutional restriction on the Union Parliament to create a public corporation. In this respect, the position of the Union Parliament in India is just the same as in America. The principle of constitutional law relevant to this subject is: In a country where the constitution is a written document which delegates specific powers to the Government, the Government, within the limits of the powers vested in it by the Constitution, can do whatever is necessary to the exercise of its functions. Parliament cannot, under the pretext of executing delegated powers, pass laws for the accomplishment of objects not entrusted to the Government. Let the end be legitimate, let it be within the scope of the Constitution, all appropriate means are constitutional which are not prohibited and are not inconsistent with the letter and spirit of the Constitution. The power to create a public corporation is never the end for which other powers are exercised, but a means by which other objects are accomplished.[45] Therefore, public corporations are among the means which Parliament may utilise in the exercise of federal powers.

[45] See Marshall in *McCulloch* v. *Maryland*, 4 Wheat (17 U.S.) 316 (1819) p. 421.

It should not be irrelevant to our study to make it clear that the state governments in India have not got the power to create a public corporation though they are competent to nationalise enterprises which fall within the orbit of the seventh schedule, List II of the Indian Constitution dealing with the state subjects. The Constitution permits the state governments to run legal public enterprises departmentally or under the Companies Act. *Vide* Article 246, clauses 43, 44 of the Constitution of India: to form a public corporation the state governments have to approach the Centre for legislation for the purpose. The relevant clauses read:

> " Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including universities."
>
> " Incorporation, regulation and winding up of corporations, whether trading or not, with object not confined to one state, but not including universities." [46]

It was in view of these constitutional points that the Central Government passed an enabling Act, " the Road Transport Corporation Act, 1950," to enable the state governments to establish road transport corporations in their respective states. Another Act of a similar character was chartered in 1951 to enable the state governments to establish industrial finance corporations.

Furthermore, according to the Indian Constitution the Union Parliament has no right to delegate its legislative functions to state legislatures. Therefore, while making such Acts of permissive nature for the states the Central Legislature is expected to define the powers and functions and such other matters like winding up procedures in express terms in the Act. It was due to such shortcomings that the Road Transport Corporation Act of 1948 was found defective and unconstitutional by the Bombay High Court. It seems that matters had been quite different in this respect in the United States where the states had been equally competent to incorporate such instrumentalities. In fact, many of the public corporations (Government Corporations as Americans call them) under the New Deal Programme were incorporated under the Laws of Delaware. The usual reason given as to why Delaware was chosen in preference to another state was that the Delaware corporation laws were much more liberal and especially suitable for this type of Government Corporation.[47] Later on, in the United States there had been a regular tendency emphasising that public corporations should be created by an Act of Congress and not by any other means. Perhaps the

[46] These are the powers of the Central Government.

[47] See Robert H. Schnell, " Federally Owned Corporations and their Legal Problems (I)," *The North Carolina Law Review* (1935) pp. 245–246.

framers of the Indian Constitution might have gathered some substance out of this trend and considered it appropriate to make specific provisions in the Indian Constitution.[48]

IV

Another problem of great (constitutional and legal) significance is the problem of compensation for those persons whose assets and interests are affected as a result of acquisition or requisition. If the property is taken without compensation the question which arises is a political one merely, since a statute is equally good whether it confiscates or merely compulsorily purchases; such is the position in the United Kingdom. This authority flows from the sovereignty of Parliament and does not depend for its defence upon the doctrine called "eminent domain." No doubt, the British Parliament has supreme powers and there is nothing to prevent it from passing legislation which would empower the state to nationalise certain assets without giving any right of compensation to the persons disappropriated. Such a policy has, however, never been adopted. Parliament in Britain respects the Rule of Law which guarantees among other things equal treatment for all citizens and freedom from arbitrary action by officials and other agents of Government.[49] There are two basic rules in English law which relate to this subject. In the first place, compensation is payable when it has been authorised by Parliament. Secondly, when property is acquired compulsorily the courts of law apply, in interpreting the statute which authorises the expropriation of property, the canon of construction that express words are needed to authorise its taking without compensation. This leads us to understand: Firstly, legislation by a legal Parliament is necessary not only for the expropriation of property but also for the payment of compensation for such expropriation. It is a corollary of the rule which means the expenditure of national funds must be authorised by Parliament. Therefore, the terms of compensation authorised must be a part of the statute which empowers the state to socialise the industry or enterprise in question. Secondly, if it is the intention of the legislature that the property be acquired by the state without any compensation, then such intention must be expressed in plain, unequivocal terms free from ambiguity and doubt in the expropriating statute.[50] All English statutes relating to nationalised

[48] See Statement of K. Santhanam, Lok Sabha Deb., November 25, 1950.

[49] M. B. Cairns, "Some Legal Aspects of Compensation for Nationalised Assets," *Law and Contemporary Problems* (1951) pp. 574–619.

[50] Lord Atkinson in his judgment in *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co., Ltd.* (1919) A.C. 744 at p. 752 said: "That canon [of construction] is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms. I

industries do give legal right of compensation to disappropriated owners.[51]

Compensation for compulsory acquisition of property has specific constitutional significance in India. Article 31 (2) deals with this subject and lays down two conditions subject to which the authority conferred upon the state could be exercised: (i) the existence of a public purpose; (ii) the payment of compensation.

The significance of the " public purpose " clause has been discussed earlier. The original provisions pertaining to compensation did not explain whether or not such provisions could be adjudicated by courts. This was left in the original clause beautifully vague. However, these provisions clearly stated that in India nationalisation or acquisition of property without compensation would be unconstitutional[52] whether it is achieved under police powers or under eminent domain even if we take the liberty of employing these foreign terms. The framers of the Indian Constitution did not qualify the phrase " compensation " with any adjective—say, " just," " reasonable " or " nominal," etc. There had been a good deal of bowling and batting on this pitch between the Bar and the Bench in India. So, it should not be irrelevant for our present study if we examine similar provisions in some other written constitutions. For example, the Amendment V of the American Constitution provides:

> " . . . nor shall private property be taken for public use, without *just* compensation."

Article 153 of the Weimar Constitution provided:

> " . . . Expropriation can only take place for the public benefit and on a legal basis. *Adequate* compensation shall be granted, unless a Reich law otherwise provides."

According to section 51 (xxxi) of the Australian Constitution the Commonwealth Parliament is empowered to make laws with respect to: " The acquisition of property on *just* terms from any State or person for any purpose in respect of which the Parliament has power

use the words ' legal right to compensation ' advisedly, as I think these authorities establish that, in the absence of unequivocal language confining the compensation payable to the subject to a sum given ex gratia, it cannot be so confined."

51 How to determine the compensation to be paid? It is a very difficult politico-economic problem and it is not possible to cover this problem in the present article. It should suffice to mention that in this field the law does not help much. Even ethics presents more complications than assistance. Mr. Herbert Morrison, in his *Socialisation and Transport*, gives quite an interesting account of this problem. Out of his discussion he evolves the concept of " Net Maintainable Reasonable Revenue " as a basis of compensation (p. 250). But the concept presents more difficulties than it solves. (For an interesting full-dress discussion see Ajit Mazoomdar: " Compensation for the Nationalisation of Industries," unpublished thesis for the degree of Ph.D., University of Oxford, 1953.)

52 It should be made clear that the above quoted provisions of the Indian Constitution are not applicable to the State of Jammu and Kashmir where landlordism was abolished without compensation.

to make laws." Dr. W. Anstey Wynes believes that the view that a Commonwealth Act authorising acquisition of property and fixing a nominal sum for compensation would be a valid enactment, is correct.[53] However, the Australian case study on this subject indicates that there has been some fluctuation in the meaning attached by the court to the words " just terms." The Australian paragraph (xxxi) is not identical in meaning with the Fifth Amendment of the Constitution of the United States.

The fathers of the Indian Constitution deliberately omitted the use of any qualifying word with " compensation." They, perhaps, presumed that in terms of acquisition legislative judgment and discretion would not be challenged in the court. But courts in India interpreted this clause in conflicting terms. Shearer J. observed in *Kameshwar Singh* v. *State of Bihar*:

> " It was . . . I have no doubt, intended by the Constituent Assembly when it enacted Art. 31 (2) that whatever compensation was made it should be something which could fairly be said to be equivalent in value to the property taken over by the state."

On the other hand, in the *Bihar* case the question of adequacy of compensation was ruled out by Mahajan, Das and Chander Sekhara Ayyar JJ., interpreting the word " compensation " to mean compensation. Chander Sekhara Ayyar J. observed: " . . . The principles determining compensation must lead to the giving or payment of some compensation."

The Constitution (Fourth Amendment) Act, 1956, has substantially abridged the scope of the compensation clause by laying down that once the legislature has fixed the amount of compensation or specified the principles on which the compensation is to be determined, the question of adequacy of the compensation so provided shall not be justiciable. This means that a statute passed by the central legislature or state legislature cannot be impeached on the ground that adequate compensation has not been given. This Amendment further makes it clear that there is no constitutional obligation to pay compensation except where property has been " acquisitioned " or " requisitioned " in the manner explained in the new clause 2A of Article 31.

We can well conclude that the Indian Constitution grants the disappropriated owners the right to have compensation which should be determined by the provisions made in the statute itself relating to the nationalisation of industry. What is provided in the Act is final and cannot be challenged in the court. Here lies the authority

[53] Legislative and Executive Powers in Australia (1936) p. 248.

of the Legislature to pay what it can at its convenience. In England there is no constitutional bond as such but legal customs point to make express provisions in the relevant Act for compensation to be paid to disappropriated owners. To be compensated is thus a legal right in Britain which is conferred upon disappropriated persons by Act of Parliament and can also be taken away from them by passing another Act of Parliament for that purpose.[54] While in India in case the ownership of a property is transferred to the state or to a corporation owned or controlled by the state, disappropriated persons have the constitutional right to be compensated.

V

What is the constitutional status of the Minister *vis-à-vis* the public corporation and Parliament? Or to put the problem in another way: What constitutional remedies are available to Parliament, if a Minister of Government happens to be transcending his powers—officially or unofficially with regard to the public corporation placed under his care? The significance of this problem does not seem to be adequately realised so far.

Perhaps it may be well to quote at the outset the most important controlling power of the Minister which enables him (in some cases after consulting the governing board), to give the board " directions of a general character as to the exercise and performance by the corporation of their functions in relation to matters which appear to him to affect the national interest." The corporation must give effect to the directions. The Minister's power to give directions to the corporation may cover any important aspect of activity of the board. In addition, the Minister has power to appoint and remove board members. He also enjoys specific powers limited to particular industries.

These far-reaching powers have been conferred upon the Minister by the statutes to protect the interests of the taxpayer, user and beneficiary. At the same time, such provisions have, undoubtedly, enlarged the field of ministerial authority beyond the reach of parliamentary supervision and of the ordinary law. Whether this influence ought to be encouraged, or whether it ought rather to be checked and limited, are questions into which, for the moment, it is not necessary to enter. But it does at least seem cogent that the constitutional significance and scope of such ministerial powers should be clearly discerned, that their essential nature and tendency should be quite plainly exhibited, and that their various interpretations and manifestations should not be permitted to continue and multiply under a cloak of

[54] See M. B. Cairns, *op. cit.*, p. 618.

obscurity. There is every probability that such powers may be used in such a way as to escape the jurisdiction of the courts and review by the legislature.

There ought to be a correlation between the constitutional status of the Minister *vis-à-vis* a public corporation and the extent of the powers given to him by the legislature over the corporation. To justify this thesis it would be perhaps useful to study briefly the constitutional position of the Minister *vis-à-vis* his regular government department.

Even the Minister's constitutional responsibility for the government department of which he is the constitutional and political head, is not altogether clear. However, conventionally it is believed that there are three types of ministerial responsibilities with regard to his department. These are:

(i) Constructive responsibility or vicarious liability: This means that the Minister is liable for actions done by his subordinates in pursuance of his general policy.

(ii) Personal responsibility or factual liability: This relates to particular orders which have emanated from the Minister, or at which he connived.

(iii) Responsibility of the Minister when his own bona fides are in question.[55]

The significance of all or any of these responsibilities may vary from case to case, but their recognition does not help to determine the constitutional status of the Minister with regard to his department. This does ensure that the Minister must answer in Parliament for any act or omission of his department. The official, who cannot be heard in his own defence, is therefore protected from attack. No Minister can protect his own head by using his official as a shield. Of course, we do know that in actual practice, "Once the mischief has been done," says Lord Chief Justice Hewart, "the whole force of the parliamentary majority tends to be directed, not so much to undoing it, as to preventing a defeat in a Parliamentary division. 'This is our lobby,' say the Whips, when the critical moment comes, and at the eleventh hour the private member is naturally disposed to acquiesce."[56] It is not possible to arrange here a large-scale discussion on practical problems of ministerial responsibility with regard to his department.

The constitutional status of the Minister with regard to a public corporation is a great deal more obscure. Due to this obscurity the

[55] See Statement of Mr. Nehru, Lok Sabha Deb. February 19, 1958. Also see Rajya Sabha Deb. February 21, 1958.

[56] See Rt. Hon. Lord Hewart, *The New Despotism* (1929) p. 19.

chances of abuse of powers—in good or bad faith—are much greater than in the case of departmental activity. Professor S. A. de Smith explains that the abuse of power can take several forms: power may be exercised for an improper purpose; power may be exercised invalidly; power may be used with gross unreasonableness, etc.[57] Besides this, " it is precisely at the point where Minister and Board meet," says Professor Hodgetts, " that the paradoxical position (combining independence and responsibility) of the corporation strikes with full force." [58] Some keen observers of the Indian and British public corporations believe that the existing obscurity is also because " the Minister's relations with the corporations in both the countries are mainly governed by personal equation and this equation is heavily weighted on the side of the Minister." [59]

It has been stated earlier that ministerial responsibility to Parliament depends on the statutory or legal powers which the Minister has over his department or the public corporation which falls within his area of control. In the case of the department, since the Minister enjoys almost complete authority, he is accountable to Parliament for all acts and omissions of his subordinates. In the case of public corporations, it is usually argued that they are autonomous or semi-autonomous bodies. Their boards enjoy discretionary powers in their day-to-day affairs. This feature further contributes to the ambiguous constitutional status of the Minister.

The statutory powers of the Minister over public corporations are limited. The most important section in the Acts is that which gives to the Minister the power of general direction in matters which appear to him to affect the national interest. This wording seems to exclude the possibility that a direction could be challenged in the courts on the ground that the national interest is not affected. But equally the wording seems to open the possibility of challenge on the ground that the direction given was particular and not general. In addition he can prohibit the board (in certain cases) from advertising the receipt of such directions. Moreover, the use of this power may mean superseding some statutory obligations of a board such as section 6 (1) of the Life Insurance Corporation Act, 1956, which states

> " Subject to the rules,[60] if any, made by the Central Government in this behalf, it shall be the general duty of the Corporation to carry on life insurance business, whether in or outside

[57] For an excellent study on this subject, see: S. A. de Smith, " The Abuse of Statutory Powers," [1956] P.L. 233.

[58] See J. E. Hodgetts, " The Public Corporation in Canada," *The Public Corporation* (edited by W. Friedmann), 1954, p. 84.

[59] See Amba Prasad, " The Theory and Practice of the Public Corporation in a Democracy," *The Indian Journal of Public Administration* (1960), p. 45.

[60] Power to issue directions does not come under the Government's rule-making powers.

India, and the Corporation shall so exercise its powers under this Act as to secure that life insurance business is developed to the best advantage of the community."

The Minister's power to appoint and remove board members gives him another extensive authority of great significance. He does not enjoy equivalent power in the case of his department. No doubt, in India as in England,[61] a servant of the state may be dismissed at pleasure and has no remedy, but his tenure is in fact secure. According to the All India Service (Discipline and Appeal) Rules, 1955, the matter can be referred to a Board of Inquiry.[62] But the aggrieved member of a corporate board has no legal remedy.

Besides these broad powers, in certain cases the Minister is given powers over the corporation which are nearly as great as those possessed by a man who holds all the shares in a private company.[63] If the theory that " responsibility should correspond to authority " is considered a reliable guide, then the magnitude of powers enjoyed by the Minister suggests that his constitutional status *vis-à-vis* the public corporation and Parliament should be *approximately* the same as in the case of his regular department. The acceptance of this thesis would lead to the following two principles:

(i) A Minister must protect a board which has carried out his explicit directions.

(ii) Equally a Minister must defend a board which acts properly in accordance with the policy laid down by the Minister.[64]

Conclusions

The rapid and calculated growth of the public corporation in India since her independence is mainly because the Indian National Congress—the party in office—is politically and constitutionally committed to establish a socialistic pattern of society which presumes an ever-expanding public sector of the national economy. For the administration of the public enterprises by means of public corporations the Government gets support from the Congress resolution on " Objectives and Economic Programme," 1947, and also from the

61 In England, a person who holds a pensionable post is only dismissed for his misconduct and then there are safeguards for his protection. There is, however, an appeal against dismissal to the head of the department. (See E. C. S. Wade and G. G. Phillips, *Constitutional Law*, 1960, pp. 177, 214).

62 For instance the case of Mr. Patel, Principal Secretary, Ministry of Finance, and Mr. G. R. Kamat, the Chairman of the Life Insurance Corporation, was referred to a Board of Inquiry, under these rules in May, 1958.

63 For instance see the powers of the Minister, according to the Employees' State Insurance Act, 1948.

64 Similar principles were evolved with regard to the constitutional status of the Minister *vis-à-vis* his department, out of the discussion on Sir Andrew Clark's Report on the Inquiry into the Disposal of Land at Crichel Down, H.C. Deb. 530/1178–1294.

statement on industrial policy of the Government, 1948. Constitutionally no person can be deprived of his property save by authority of law. To pass an Act to this effect or to establish a monopoly in favour of the state or state- owned or controlled public corporation, the Act must be: (a) reasonable; (b) for a public purpose; (c) must provide for compensation. By virtue of the First and Fourth Constitutional Amendment Acts (1951 and 1954 respectively) the authority of the legislature is supreme and unimpeachable on: what is reasonable; what is a public purpose; and, how much compensation be given for expropriation. The jurisdiction of the court in this respect has been left very limited indeed. Is this an encouraging constitutional development in India?

About Britain, though it is held that the legislative authority of Parliament is supreme yet we have been warned by Professor G. W. Keeton, and earlier by Lord Hewart, about the increasing ascendency of the British executive over Parliament and the regular courts. Prof. Keeton asserts that, in Britain, both the rule of law and the sovereignty of Parliament have become polite and increasingly meaningless fictions, whereas the American state has developed the judicial power to a degree never before attained. It is usually said that the American state has become the slave of a judicial oligarchy. In India it seems that by means of constitutional amendments an attempt has been made to maintain the prestige of Parliament which indirectly means enhancing the political and constitutional power of the " vote." This is, of course, an encouraging development which can further be solidified if the constitutional status of the Minister *vis-à-vis* a public corporation and Parliament is accepted on the basis of the extent of the powers given to him by the legislature over the corporation.

LA LOI DANS LA CONSTITUTION DE 1958

P. M. GAUDEMET

PARMI les innovations juridiques apportées par la Constitution française de 1958 la transformation du concept classique de loi est sans doute la plus importante. Sans doute bien des observateurs ont été davantage frappés par l'originalité d'une expérience qui tentait d'introduire dans un cadre constitutionnel parlementaire les réalités politiques d'un régime présidentiel. Mais les caractères de ce système politique hybride ne présentent sur le plan des principes qu'un intérêt mineur tant l'expérience est dominée par la personnalité des acteurs. Bien plus qu'aux textes juridiques c'est au caractère des hommes au pouvoir que le régime politique français actuel doit ses particularités et cet étrange glissement du pouvoir des mains du Premier Ministre, Chef du Gouvernement vers celles du Président de la République, Chef de l'Etat.

Pour être moins spectaculaire que la transformation des structures de l'exécutif, l'abandon de la conception classique de la loi entraîne des bouleversements juridiques bien plus profonds, car le renversement des principes traditionnels n'est pas lié ici à des contingences historiques ou à la personnalité d'un homme. Mais il résulte d'une volonté délibérée de transformation juridique.

La conception classique et traditionnelle de la loi était simple. Elle découlait de la philosophie politique de Rousseau pour qui la loi est " l'expression de la volonté générale." La conception de la loi se caractérisait par deux traits. Elle était *organique*, elle était aussi *extensive*.

Avant tout la loi était l'oeuvre de la représentation nationale, elle était votée par les Chambres, chargées d'exprimer la volonté générale. C'est dire que la loi était définie par la procédure qui avait présidé à son élaboration. Elle était l'acte voté par les Chambres et promulgué par le Chef de l'éxécutif suivant la procédure constitutionnelle. Son objet importait peu. C'était son origine qui la marquait. C'était une *conception organique* de la loi qui prévalait.

De son origine formelle la loi tirait son deuxième caractère. Emanant de la représentation nationale, la loi était comme la volonté

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générale elle-même souveraine. Son autorité était absolue et toutes les règles juridiques devaient respecter ses dispositions. L'illégalité était un vice qui frappait tout acte juridique de nullité.

S'imposant à tout l'ordre juridique national la loi n'était elle-même soumise qu'au respect de la Constitution. Encore cette soumission était-elle assez illusoire. Faute d'avoir organisé un contrôle efficace de la constitutionnalité des lois, les divers régimes français laissaient pratiquement au législateur une liberté d'action que la prudence des tribunaux français n'avait jamais voulu restreindre. Aussi bien le domaine de la loi était-il illimité et le législateur pouvait réglementer à sa guise tous les domaines sans se préoccuper de savoir si d'autres lois ou des règlements administratifs étaient déjà intervenus en ces matières. Ainsi estimait-on que la loi s'imposait à toute autre règle juridique et que son domaine était sans limite. C'est à bon droit que la conception traditionnelle de la loi pouvait être dite *extensive.*

C'est cette conception *organique* et *extensive* de la loi dont Raymond Carré de Malberg avait magistralement brossé la théorie dans son célèbre ouvrage *La loi expression de la volonté générale* paru en 1920 et 1922. C'était l'heure même où la conception révolutionnaire de la loi vieille de près de 150 ans allait subir les assauts des exigences du monde moderne.

Dès 1924 en effet la conception organique et extensive de la loi a commencé par être battue en brèche. M. Waline dans un récent article de la *Revue du Droit Public* [1] a décrit les étapes de ce gauchissement progressif de la conception traditionnelle de la loi pendant les 15 dernieres années de la III° République et surtout sous la IV°. Sans en retracer toutes les péripéties, disons seulement que la conception classique fut atteinte dans ses deux caractères organique et extensif.

La pratique des " décrets lois " porta à la conception organique un premier coup qui sans la détruire devait néanmoins profondément l'ébranler. La loi cessait d'être exclusivement l'acte délibéré par le Parlement. Les Chambres incapables de résoudre les problèmes financiers, économiques et militaires posés par le monde moderne abandonnaient leur compétence législative à l'exécutif par des lois dites de " pleins pouvoirs." Ainsi celui-ci se trouvait-t-il habilité à prendre de plus en plus fréquemment à partir de 1924 des actes de nature hybride appelés " décrets lois." Ces actes sans être formellement des lois possédaient pourtant certains caractères des actes législatifs puisqu'ils pouvaient abroger les lois antérieures et ne pouvaient être eux-mêmes modifiés que par des actes législatifs. La conception organique n'était pas détruite puisque seules les Chambres pouvaient

1 M. Waline, " Les rapports entre la loi et le règlement avant et après la constitution de 1958," R.D.Pu., 1959, No. 4, p. 702.

faire des lois véritables, mais elle était faussée puisque l'exécutif prenait parfois des actes ayant la valeur juridique de lois.

Le caractère extensif de la conception classique de la loi fut aussi attaqué. La loi du 17 août 1948 ouvre une deuxième brèche dans la conception traditionnelle en dégageant la notion de " matières réglementaires par leur nature." Toutes les lois intervenues en ces matières avant le 17 août 1948 perdent leur caractère législatif et de simples décrets réglementaires peuvent désormais les modifier ou les abroger pourvu qu'ils soient pris en Conseil des Ministres après avis du Conseil d'Etat. Ainsi la conception devient moins extensive. Dans le domaine défini par la loi du 17 août 1948 comme " réglementaire par nature "—et c'est un domaine étendu—la loi cesse d'être souveraine puisque des décrets réglementaires peuvent la modifier. S'il est attaqué par la loi du 17 août 1948, le caractère extensif de la conception de la loi subsiste pourtant. Rien n'empêche en effet après le 17 août 1948 le législateur d'édicter des lois dans ce domaine réglementaire par nature et même les lois intervenues dans ces domaines postérieurement au 17 août 1948, à la différence de celles promulguées avant cette date, demeuraient souveraines et ne pouvaient plus être modifiées que par d'autres lois et non par de simples décrets.

Ainsi à la fin de la IV° République la belle conception classique, organique et extensive de la loi subsistait dans son principe, mais elle était profondément déformée dans son application puisque l'exécutif se voyait reconnaître la compétence de prendre des actes ayant force législative et puisque par ailleurs un domaine privilégié était reconnu au pouvoir réglementaire de l'exécutif.

Ainsi le Parlement ayant fait preuve de son impuissance à légiférer souverainement dans le domaine illimité que la conception classique lui ouvrait les solutions adoptées à la fin de la IV° République portaient suivant la formule véhémente de M. Waline " la marque de l'empirisme, de l'illogisme et de l'incohérence."

Cette situation explique que les constituants de 1958 aient voulu remettre un peu d'ordre en ce domaine comme en beaucoup d'autres. Pour y parvenir ils devaient jeter les bases d'une conception entièrement nouvelle de la loi. Cette conception à laquelle ses adversaires mêmes ont dû reconnaître le mérite d'apporter une solution logique aux problèmes des rapports de la loi et du règlement soulève néanmoins de graves objections dans son application. Formulée par les articles 34 et 37 de la Constitution, elle entraîne dans la pratique de nombreuses difficultés. Aussi conviendra-t-il après en avoir exposé les bases d'en apprécier ensuite les conséquences.

I—Les Bases de la Conception de la Loi dans la Constitution de 1958

Deux préoccupations essentielles inspiraient les constituants de 1958 lorsqu'ils élaborèrent leur nouvelle conception de la loi.

Une préoccupation technique, c'était de remettre de l'ordre dans les rapports entre la loi et le décret et de mieux délimiter les domaines législatifs et réglementaires, afin de mettre fin aux errements de la IV° République et d'éviter que les matières fondamentales comme le régime fiscal ou monétaire fussent transformées par décret tandis que le législateur s'épuisait à voter des lois sur des matières d'importance mineure comme cette loi du 30 avril 1946 qui établit la distinction subtile entre les kinésithérapeutes et les masseurs gymnastes médicaux ou celle du 13 avril 1946 qui distinguait plus subtilement encore entre les crèmes glacées et les ice cream.[2] Pour assurer cette remise en ordre les constituants pensèrent qu'il fallait abandonner la conception purement organique de la loi pour adopter une *conception matérielle* qui apparaît dans l'article 34 de la Constitution.

Le second souci des auteurs de la Constitution était *politique*. Ils voulaient réduire le rôle du Parlement dont l'omnipotence passée n'avait pas naguère empêché l'impuissance et renforcer l'exécutif dont on avait déploré la faiblesse. A cette fin ils pensèrent qu'il fallait abandonner la conception extensive classique de la loi pour lui substituer une conception restrictive qu'exprime l'article 37 de la Constitution.

Matérielle et restrictive telles sont les deux caractéristiques essentielles de la nouvelle conception constitutionnelle de la loi. Elles demandent toutes deux à être expliquées.

A. *Le caractère matériel*

L'idée de définir la loi non plus par l'organe qui l'édicte mais par les matières qu'elle régit n'est pas absolument nouvelle en Droit Public français.

Les premières constitutions révolutionnaires avaient déjà appliqué cette technique. Ainsi la Constitution de 1793 avait-elle défini un domaine de la loi ne laissant à la réglementation du décret que les matières mineures ou urgentes. La Constitution de 1793 divisait les actes accomplis par le Corps Législatif en deux catégories: les lois et les décrets. L'article 54 précisait que sont compris sous le nom général de loi les actes du corps législatif concernant la législation civile et criminelle, l'administration générale des revenus et des dépenses ordinaires de la République, les domaines nationaux, le titre, le poids, la dénomination des monnaies etc. . . . Etaient désignés

[2] Cité par Ripert, *Le déclin du droit*, 1946, p. 102.

sous le nom de décret les actes énumérés à l'article 50, actes moins importants ou exigeant une décision urgente, tels que la fixation annuelle des effectifs militaires, les dépenses extraordinaires, les mesures de sûreté . . . la nomination et destitution des commandants en chefs. . . . Cette distinction matérielle s'accommodait d'ailleurs d'une distinction formelle, les procédures d'adoption de la loi et du décret étant différentes. Suivant la formule de l'article 53: " Le Corps Législatif *propose* les lois et rend des décrets," l'approbation finale par référendum étant nécessaire pour la loi et non pour le décret.

C'est cette conception matérielle que reprennent en la systématisant les constituants de 1958 sans abandonner toutefois totalement les considérations organiques.

Cette conception conduit les constituants de la V° République à distinguer deux catégories de lois: les lois organiques et les lois ordinaires.

1°) *Les lois organiques.* Les lois organiques se définissent par les matières très limitées sur lesquelles elles peuvent intervenir. C'est la Constitution seule qui prévoit les cas où des lois organiques viendront compléter certaines de ses dispositions.

Ainsi l'article 6 prévoit-il une loi organique pour déterminer les modalités de l'élection du Président de la République. L'article 23 prévoit une loi organique pour préciser les conditions de remplacement des parlementaires nommés membres du Gouvernement. L'article 25 remet à des lois organiques le soin de fixer la durée des pouvoirs de chaque assemblée, le nombre de ses membres, leur indemnité, les conditions d'éligibilité, le régime des incompatibilités. L'article 34 prévoit une loi organique pour fixer les conditions de présentation des lois de finances, et l'on pourrait multiplier encore les exemples.

Ainsi la loi organique se définit matériellement comme un texte prolongeant la Constitution sur les points expressément prévus par elle. Suivant la formule de l'article 46 c'est la Constitution qui leur " confère le caractère de lois organiques."

Cependant la conception formelle de la loi n'a pas totalement disparu. L'article 46 prévoit une procédure spéciale pour l'adoption et la modification des lois organiques. Des conditions de délais pour leur délibération et leur vote, la consultation obligatoire du Conseil Constitutionnel notamment leur confèrent ainsi une autorité supérieure à celle de la loi ordinaire.

2°) *Les lois ordinaires.* Pour les lois ordinaires c'est aussi une définition matérielle qui découle de l'article 34. Celui-ci énumère les matières que la loi peut réglementer. Il en définit le domaine qui englobe deux provinces:

La première comprend les matières dont la loi fixe toutes *les règles.*

Ce sont essentiellement les questions se rapportant aux libertés publiques, l'état et la capacité des personnes, les régimes matrimoniaux, les successions, les libéralités, la détermination des crimes, des délits et des peines les réprimant, le régime des impôts et de la monnaie, le régime électoral, les garanties des fonctionnaires, les nationalisations, la création de nouveaux ordres de juridiction ou de nouvelles catégories d'établissement public.

La seconde province est celle des matières dont la loi se borne à déterminer *les principes fondamentaux*, laissant au pouvoir réglementaire le soin d'en fixer les détails. Ainsi en va-t-il de l'organisation de la Défense Nationale, de l'Administration locale, de l'Enseignement, du régime de la propriété, des droits réels et des obligations, du droit du travail et de la sécurité sociale.

La liste ainsi dressée par l'article 34 pourra éventuellement être précisée et complétée par une loi organique. Sous cette réserve elle est limitative et l'article 37 a le soin de préciser que toutes autres matières ont le caractère réglementaire, c'est-à-dire qu'elles relèvent du décret.

Ainsi la conception matérielle de la loi triomphe et M. Waline a pu écrire " La loi doit désormais se définir comme l'acte (posant des règles de droit) intervenu dans l'une des matières énumérées par l'article 34."

En effet tous les actes en forme législative c'est-à-dire votés par le Parlement intervenus dans toute autre matière que celles énumérées par l'article 34 sont rabaissés au rang de simples textes réglementaires par l'article 37 de la Constitution. Ils peuvent être modifiés par simple décret en Conseil d'Etat s'ils ont été adoptés avant l'entrée en vigueur de la Constitution et par décret en Conseil d'Etat après décision du Conseil Constitutionnel reconnaissant le caractère réglementaire de ces textes s'ils ont été édictés après elle. Ainsi c'est bien l'objet du texte et le fait qu'il rentre dans les matières énumérées à l'article 34 qui confère le caractère législatif à un texte et non pas la procédure de son élaboration et le fait qu'il a été voté par le Parlement.

Malgré ce triomphe de la conception matérielle certains ont pu croire que les constituants de 1958 n'avaient pas totalement abandonné la conception formelle ou organique. L'article 34 ne dispose-t-il pas: " *La loi est votée par le Parlement.*"

Ne faudrait-il pas dès lors une double condition pour que l'on soit en présence d'une loi: que par son objet le texte réglemente les matières énumérées à l'article 34, que par son origine organique il émane du Parlement. Mais M. Waline a pu montrer que cette condition n'était pas vraiment nécessaire.

Dans deux cas en effet au moins des textes pourront avoir valeur législative sans émaner du Parlement pourvu que leur objet appartienne au domaine législatif.

C'est dans l'hypothèse de crises exceptionnellement graves le cas de l'article 16 qui permet au Président de la République de prendre *seul toutes mesures* exigées par les circonstances y compris des mesures législatives.

C'est aussi le cas de l'article 38 qui permet au Gouvernement de solliciter du Parlement l'autorisation de prendre pendant une période de temps limité par Ordonnances adoptées en Conseil des Ministres après avis du Conseil d'Etat " des mesures qui sont normalement du domaine de la loi " et qui à l'expiration d'un délai fixé par la loi d'habilitation ne peuvent plus être modifiées que par une loi.

C'est ainsi que la loi du 4 février 1960 a permis au Gouvernement sous la signature du Général de Gaulle, Président de la République, de prendre pendant un an par Ordonnance " les mesures comprises normalement dans le domaine de la loi et nécessaires pour assurer le maintien de l'ordre, la sauvegarde de l'Etat et de la Constitution, la pacification et l'administration de l'Algérie." De nombreuses Ordonnances furent ainsi prises suivant la procédure de l'article 38—les projets de loi entraînant leur ratification ayant été déposés devant le Parlement—elles ont valeur législative. La loi du 30 juillet 1960 a ouvert de même la voie des Ordonnances pour prendre des " mesures nécessaires pour lutter contre certains fléaux sociaux."

Signalons enfin que l'article 11 de la Constitution permet d'adopter par la voie du référendum sans intervention du Parlement des lois portant sur l'organisation des pouvoirs publics, comportant approbation d'un accord de communauté ou tendant à autoriser la ratification d'un traité qui, sans être contraire à la Constitution, aurait des incidences sur le fonctionnement des institutions. Ainsi fut prise à la suite du référendum du 8 janvier 1961 la loi du 14 janvier 1961 concernant l'autodétermination des populations algériennes.

Ainsi le vote du Parlement n'est-il plus nécessaire ni suffisant pour qu'il y ait loi. L'acte législatif ne se définit plus par sa procédure d'élaboration mais par son objet. La conception organique de la loi a fait place à une conception matérielle. Mais ce n'est pas la seule caractéristique de la conception nouvelle. Elle est marquée aussi par son caractère restrictif.

B. *Le caractère restrictif*

La volonté politique d'affaiblir le Parlement qui marque toute la Constitution de 1958 n'a pas manqué d'influencer la conception de la loi adoptée par les constituants. A la conception extensive d'une loi souveraine dont le domaine est sans limite ils ont substitué une

conception restrictive d'une loi dont l'autorité est limitée et le domaine étroitement circonscrit.

Cette limitation de l'autorité de la loi apparaît d'abord dans l'organisation contraire aux traditions françaises d'un contrôle de la constitutionnalité des lois. La suprématie constitutionnelle déjà reconnue dans les régimes antérieurs n'y était guère sanctionnée. Aujourd'hui le Conseil Constitutionnel doit empêcher que le législateur ne sorte des limites où l'enferme la Constitution. Le Président de la République, le Premier Ministre, les Présidents des Assemblées peuvent le saisir des lois avant leur promulgation et toute disposition déclarée par lui inconstitutionnelle ne pourra être ni promulguée ni mise en application (articles 61 et 62 de la Constitution). Aussi bien le caractère restrictif de la conception de la loi apparaît bien par la manière stricte dont les constituants ont entendus empêcher le Parlement de sortir de son domaine, tandis qu'au contraire l'exécutif pouvait y faire des incursions.

Toutes précautions sont prises pour empêcher le Parlement de légiférer hors des matières qui lui sont limitativement réservées. En effet il ne peut réglementer que les matières mises dans son domaine par l'article 34. L'énumération est limitative.

Si d'aventure le Parlement tentait de voter une loi en dehors de son domaine réservé, le gouvernement pourrait d'après l'article 41 déclarer la proposition ou l'amendement irrecevable et empêcher ainsi son vote. En cas de désaccord entre le Gouvernement et le Président de l'Assemblée, le Conseil Constitutionnel statue et empêche ainsi définitivement le Parlement de sortir de son domaine.

Cependant si la négligence ou la complicité du Gouvernement laisse le Parlement voter un texte hors de son domaine, ce texte n'aura pas valeur législative, car si le Conseil Constitutionnel reconnaît son caractère réglementaire, il pourra être modifié par l'exécutif par décret.

Si la loi ne peut s'échapper de son domaine, elle doit par contre admettre les empiètements de l'exécutif sur son terrain. Comme nous l'avons vu le Président de la République en cas de crise exceptionnelle en vertu de l'article 16 et le Gouvernement après autorisation parlementaire en vertu de l'article 38 peuvent légiférer dans le domaine de la loi et prendre des décisions ou des ordonnances ayant force juridique de lois puisqu'ils peuvent modifier des lois antérieures et ne pourront à l'avenir être modifiées que par des lois.

Ainsi apparaît bien le caractère très restrictif de la compétence législative d'un Parlement strictement enfermé dans son domaine dont il n'a même pas la pleine maîtrise.

La conception de la loi a cessé d'être organique et extensive,

elle est matérielle et étroite. C'est là une révolution juridique dont il nous faut maintenant apprécier les conséquences.

II—Les Conséquences de la Conception de la Loi dans la Constitution de 1958

La nouvelle conception de la loi adoptée par la Constitution de 1958 a généralement été assez mal accueillie par les juristes français. Que ce soit les publicistes avec MM. Waline et Morange ou les privatistes avec Paul Durand tous ont fait des réserves sur les conséquences que cette conception révolutionnaire qui risquait selon eux d'engendrer un grand désordre dans le monde du Droit. Deux séries d'objections ont été développées à l'encontre de la nouvelle notion constitutionnelle de la loi: les unes se situent sur le plan *technique* et s'attaquent principalement aux conséquences de la conception *matérielle* de la loi, les autres se placent sur le plan *politique* et critiquent les conséquences de la conception *restrictive* de la loi.

A. *La conception matérielle de la loi et ses conséquences techniques*

Le fait d'avoir voulu définir strictement le domaine réservé au législateur en énumérant limitativement les matières sur lesquelles il avait compétence pour légiférer partait de l'intention louable d'empêcher le législateur de s'épuiser à réglementer des matières d'importance mineure. Mais ce principe soulève des difficultés d'application pratique considérables.

Tout d'abord les juristes ont pu aisément critiquer la liste des matières que l'article 34 avait réservé au législateur. Ainsi Paul Durand [3] pouvait-il déplorer que cette liste ne comprît pas la détermination des contraventions alors qu'elles peuvent être réprimées par l'emprisonnement, ou les règles sur la compétence et la procédure des juridictions.

Plus fondamentale est l'objection que soulève la distinction des matières que la loi réglemente entièrement et de celles dont la loi ne fait que déterminer les " principes fondamentaux." La notion même de " principe fondamental " est une notion juridique bien incertaine. C'est le doyen Ripert [4] qui déclarait à juste titre que les " tentatives de classification des principes se heurtent à l'impossibilité d'une précision." Dès lors il sera bien difficile de savoir si la loi se borne à déterminer un principe fondamental ou si elle n'édicte pas déjà une règle d'application. Le Conseil Constitutionel dans les décisions du 27 novembre 1959 et le Conseil d'Etat dans son arrêt Laboulaye

[3] Paul Durand " La décadence de la loi dans la Constitution de la V° République," Semaine Juridique, 4 Février 1959, No. 1470.

[4] Ripert, *Les forces créatrices du droit*, p. 325 *et seq.*, cité par P. Durand, *op. cit.*

du 28 octobre 1960 ont eu déjà à se prononcer sur cette question délicate. Ni l'un ni l'autre n'ont réussi à dégager—et pour cause—un critère précis—ainsi l'interprétation de l'article 34 dans son tracé des frontières de la loi risque aussi de soulever des problèmes délicats. Leur solution apparaîtra d'autant plus complexe qu'elle appartient à des autorités différentes.

Si c'est un décret qui risque d'empiéter sur le domaine réservé au législateur c'est en effet au *Conseil d'Etat* d'apprécier où l'article 34 place la frontière pour savoir si elle a été transgressée. Si au contraire c'est le législateur qui tente de s'évader de sa prison pour pénétrer sur le terrain réglementaire c'est au *Conseil Constitutionnel* d'estimer où les limites sont constitutionnellement fixées. Sa décision s'impose d'ailleurs à toutes autorités administratives et juridictionnelles donc au Conseil d'Etat (article 62).

Enfin la délégalisation de toutes les matières qui ne sont pas comprises dans l'énumération de l'article 34 risque d'introduire une grande confusion dans les codifications antérieures.

Suivant les chapitres ou les sections, voire les articles, les dispositions des vieux codes conserveront ou non leur valeur législative suivant que leur objet entre ou non dans le domaine déterminé *par l'article* 34. Ainsi un phénomène de "*décodification*" comme l'a appelé Paul Durand risque de se produire. Si l'on songe au progrès juridique que marque la rédaction des grands codes français, ce processus de "décodification" risque bien de faire figure de régression.

Ainsi, multiples sont les objections que soulève sur le plan technique la conception matérielle de la loi adoptée par les constituants. Mais c'est aussi sur le plan politique que la conception nouvelle se trouve attaquée.

B. *La conception restrictive de la loi et ses conséquences politiques*

Deux critiques d'ordre politique ont été adressées à la nouvelle conception restrictive de la loi: On dit d'abord qu'en laissant à l'exécutif le soin d'édicter désormais la majeure partie des règles juridiques on risque d'abaisser la valeur technique de ces textes. On dit aussi qu'en privant la Parlement d'une grande partie de sa compétence législative, on fausse le principe de la séparation des pouvoirs et risque d'aboutir à la dictature du Gouvernement.

Ces deux critiques bien que très souvent formulées ne nous semble pas décisives. Sur la valeur technique de la législation d'origine gouvernementale il est possible sans doute de faire des réserves. C'est à juste titre que l'on a pu dénoncer l'imperfection technique des textes juridiques élaborés par le gouvernement. Le travail des administrations est souvent hâtif, la coordination entre les décrets préparés au sein des divers ministères n'est pas toujours parfaite et il n'est pas

difficile de trouver dans les décrets lois publiés sous la III° et la IV° République pour ne pas parler des textes de la V° des exemples de malfaçon.

Mais ces imperfections dans la rédaction des textes d'origine gouvernmentale ne doivent pas nous faire oublier l'incapacité du Parlement dans la plupart des pays à élaborer la législation exigée par le monde moderne. La complexité des problèmes, leur caractère technique, la rapidité et parfois le secret qu'exige leur préparation, l'impopularité des mesures les plus souvent indispensables obligent aujourd'hui presque partout le Parlement à s'en remettre au Gouvernement pour l'élaboration des textes législatifs.

S'il conserve encore souvent un rôle dans l'édification de l'ordre juridique moderne le Parlement n'a la plupart du temps qu'un rôle purement formel. C'est dans le secret des bureaux des ministères ou dans les coulisses de la direction des partis ou du Parti que s'élaborent aujourd'hui les réformes législatives, et ceci dans la quasi totalité des pays. Le Parlement n'est plus guère là que pour les entériner et lorsqu'il faut les amender il s'en faut que ses amendements soient toujours source d'une amélioration technique des projets. Dans ces conditions il paraît vain de critiquer l'imperfection technique de la réglementation juridique gouvernementale, puisqu'aussi bien les lois votées par le Parlement sont rarement préparées effectivement par lui et qu'elles ne présentent pas la plupart du temps une valeur technique supérieure.

Mais la deuxième objection politique apparaît alors. Priver le Parlement d'une grande part de sa compétence législative, n'est-ce pas méconnaître le principe de la séparation des pouvoirs? Remettre la compétence législative à l'exécutif n'est-ce pas concentrer les pouvoirs aux mains du Gouvernement et ouvrir la porte à la dictature?

Cette objection qui est apparue en filigrane dans bien des critiques adressées aux constituants de 1958 ne nous semble en réalité pas sérieuse.

La vieille conception aristotélicienne de la séparation des pouvoirs semble aujourd'hui singulièrement dépassée.

L'idée qu'un pouvoir législatif exercé par une Assemblée fait la loi et édicte les règles juridiques tandis qu'un pouvoir exécutif confié à un Gouvernement dirige la politique en appliquant la loi ne correspond plus à la réalité des régimes politiques modernes.

Partout, même dans les régimes de type présidentiel qui se piquent d'appliquer strictement la séparation des pouvoirs, on voit l'exécutif édicter des règles juridiques que ce soit les " Executive Orders " américains, les décrets lois français ou belges ou les ordres en Conseil britanniques ou les décrets ayant force de loi du Conseil d'Etat polonais et partout également on voit les Assemblées ne pas se

cantonner dans une tâche législative mais au contraire intervenir de plus en plus étroitement notamment par leurs commissions dans la conduite politique du pays en assurant notamment le contrôle du gouvernement et parfois en se substituant aux ministres.

Dans la technique constitutionnelle moderne la séparation est bien moins entre un pouvoir exécutif ou gouvernemental et un pouvoir législatif qu'entre un pouvoir d'action politique qui appartient à ceux qui gouvernent et qui implique la possibilité d'édicter des règles juridiques et un pouvoir de contrôle qui appartient aux Assemblées représentatives et qui évite que le pouvoir gouvernemental ne devienne dictatorial. C'est notamment cette technique qui a été adoptée pour l'organisation constitutionnelle des Communautés Européennes. L'essentiel de la séparation des pouvoirs est ainsi sauvegardée: Le pouvoir arrête le pouvoir comme le préconisait Montesquieu et la liberté est sauve, mais ce n'est plus par l'équilibre entre législatif et exécutif mais par le contrepoids que le pouvoir de contrôle des Assemblées apport au pouvoir d'action du Gourvernement.

Dès lors la conception de la loi de la V° République ne nous semble pas criticable pour avoir remis très largement à l'exécutif le soin d'édicter les règles juridiques.

Le reproche que nous lui adresserions plutôt est d'avoir maintenu la compétence législative des Assemblées. C'est la source en effet de ces difficultés de délimitation de domaine que la conception matérielle de la loi traîne avec elle comme un boulet. Mieux aurait valu à notre avis remettre l'intégralité de la compétence législative aux autorités dites exécutives quitte à rendre plus effectif et à sanctionner plus efficacement le pouvoir de contrôle du Parlement pour éviter les abus du Gouvernement.

Ainsi la conception matérielle et étroite de la loi adoptée par la Constitution française de 1958 ne nous semble pas trop restrictive. En réduisant la compétence législative du Parlement, elle est dans le sens de l'évolution constitutionnelle moderne, mais c'est pour ne pas avoir été jusqu'au bout de cette évolution qu'elle laisse subsister certaines difficultées techniques dans son application quotidienne.

CURRENT SURVEY

PAGE
United Kingdom 398
Commonwealth and Dependent Territories 428

This digest, which has been compiled by Gordon Borrie, Barrister-at-Law, covers the period July 1, 1961, to September 30, 1961.

UNITED KINGDOM

Courts

Legal Aid and Advice

Scotland. The Legal Aid (Scotland) Act, 1949 (Commencement) (No. 6) Order, 1961, brought into operation on August 15, 1961, the provisions of the Legal Aid (Scotland) Act, 1949, which are necessary to enable the operation as from that date of legal aid in connection with appeals to the Lands Valuation Appeal Court (S.I. 1961 No. 1491).

The Act of Sederunt (Legal Aid Rules) (Amendment), 1961, amends the Act of Sederunt (Legal Aid Rules), 1958, by treating proceedings in the Lands Valuation Appeal Court as distinct proceedings for the purposes of legal aid (S.I. 1961 No. 1549).

Statistics

England and Wales. The civil judicial statistics relating to the Judicial Committee of the Privy Council, the House of Lords, the Supreme Court of Judicature, county courts and other civil courts, for 1960, have been published (Cmnd. 1416).

Scotland. The civil judicial statistics relating to the House of Lords, the Court of Session, Sheriff Courts and other civil courts, licensing courts, certain legal and public departments and bankruptcy, for 1960, have been published (Cmnd. 1408).

The Crown

Crown Lands

The Crown Estate Act, 1961 (9 & 10 Eliz. 2, c. 55), received the Royal Assent on July 27, 1961. The Act makes new provision for the management of the Crown Estates by the Crown Estate Commissioners.

S. 1 and Sched. I provide for the continuance and constitution of the Crown Estate Commissioners and repeals the Crown Lands Acts, 1829 to 1936; the Commissioners have complete powers to manage and improve the Estate for the Crown free from any restraint or alienation imposed on the Crown by the Crown Lands Act, 1702 (1 Ann. c. 1) (s. 1 (2)); no person dealing with the Commissioners is concerned to inquire as to the extent of their authority or the observance of any restrictions on the exercise of their powers (s. 1 (5)); the Commissioners are to act by such documents as they would if acting as agents on behalf of a subject, and the documents are to be so construed, save that an advowson will not pass in the absence of express words (s. 1 (6)); s. 2 provides for reports and accounts of the Commissioners; s. 3 contains general provisions as to the course of management of the Estate; s. 4 provides for grants

for public or charitable purposes to be made under the Royal Sign Manual with special provision for grants for the sites of churches under the New Parishes Measure, 1943 (6 & 7 Geo. 6, No. 1); s. 5 contains special provisions as to the Windsor Estate; s. 6 gives power to make regulations for land open to the public; s. 7 transfers part of Regent's Park to the Minister of Works and clarifies his powers; s. 8 makes new provision for escheats, undivided shares in land held by the Commissioners immediately before January 1, 1926, and for forest lands, and amends the Forestry (Transfer of Woods) Act, 1923 (13 & 14 Geo. 5, c. 21) as it affects the Estate; s. 9 savings and transitional provisions and repeals; s. 10 short title, etc.

The Act which extends to Scotland and Northern Ireland, the Isle of Man and Alderney, came into force on July 27, 1961.

Education

Debate

On July 17, 1961, the House of Commons debated Education in Committee of Supply (644 H.C. Deb. 889–1008).

Scotland

Superannuation. The Superannuation (Teaching and Public Boards) (Scotland) Rules, 1961, revoke the Superannuation (Teaching and Public Boards) (Scotland) Rules, 1952, but they repeat the provisions with amendments and extend the Rules. They bring within the scope of the Rules the Gas Council, the Area Gas Boards, the South of Scotland Electricity Board, the Port of London Authority, the United Kingdom Atomic Energy Authority, the Nature Conservancy, the Scottish Land Court, the Forestry Commission, the British Council and the British Broadcasting Corporation. The purpose of the Rules is to provide for the preservation of the superannuation rights of persons who transfer from pensionable service under the Teachers (Superannuation) (Scotland) Regulations, 1957, to pensionable service under the public boards designated in the Schedule to these Rules, or vice versa, by appropriate transfer value payments as between the Secretary of State and the public board's superannuation fund. Where such a transfer is made the person is enabled to reckon the whole of his pensionable service for pension under the superannuation system to which he transfers.

This retrospective application of the Rules is made under the express powers given by, and subject to the conditions prescribed in, section 2 of the Superannuation (Miscellaneous Provisions) Act, 1948 (S.I. 1961 No. 1566).

Universities. On June 30, 1961, the House of Commons debated university education in Scotland (643 H.C. Deb. 935–974).

Superannuation

The report by the Government Actuary on the Teachers' Superannuation Scheme (England and Wales), 1948 to 1956, has been published (H.C. 269 of 1960–61).

See also Government Functions and Appointments (below, this page).

Government Functions and Appointments

Control of Public Expenditure

The report of the Committee on the Control of Public Expenditure (Chairman: Lord Plowden, K.C.B., K.B.E.) has been published (Cmnd. 1432).

Inspectorate

Factories. The annual report of the Chief Inspector of Factories, 1960, has

been published (Cmnd. 1479). The annual report of the Chief Inspector of Factories on Industrial Health, 1960, has also been published (Cmnd. 1478).

Fire Services. The reports have been published of Her Majesty's Inspector of Fire Services for Scotland, 1960 (Cmnd. 1420), and of Her Majesty's Chief Inspector of Fire Services (Counties and County Boroughs, England and Wales), 1960 (Cmnd. 1447).

Mines. The report of the Chief Inspector of Mines and Quarries, 1960, has been published (H.M.S.O. 41–112–0–60).

Police. The report of Her Majesty's Inspectors of Constabulary, 1960, has been published (H.C. 248 of 1960–61).

Ministers' Functions

Department of Technical Co-operation. The Department of Technical Co-operation Order, 1961, made under the Ministers of the Crown (Transfer of Functions) Act, 1946, as extended by subsection (3) of section one of the Department of Technical Co-operation Act, 1961, directs that certain functions under the enactments referred to in the Schedule to the Order may be exercised by the Secretary for Technical Co-operation concurrently with the Secretary of State who at present exercises those functions (S.I. 1961 No. 1501).

The new Government department, the Department of Technical Co-operation, came into being on July 24, 1961. The Minister in charge of the Department who is known as the Secretary for Technical Co-operation is Mr. Dennis Vosper.

The new department is taking over present work on technical assistance performed by the three overseas departments (the Foreign Office, the Commonwealth Relations Office and the Colonial Office) and the Ministry of Labour, together with their present staffs engaged on this work. The object is to enable the United Kingdom to meet more effectively requests for technical assistance received from the Governments of developing countries inside and outside the Commonwealth.

Among the main activities of the Department of Technical Co-operation will be the following:

(i) Recruitment of staff for service with overseas Governments and international organisations.
(ii) Arrangements for the training of such staff, including staff already in the service of overseas Governments.
(iii) Administration of the Overseas Service Aid Scheme which was set out in the White Paper, "Service with Overseas Governments" (Cmnd. 1193 published in October last year).
(iv) Responsibility for the work of the Directorate of Overseas (Geodetic and Topographic) Surveys and the Directorate of Overseas Geological Surveys.
(v) Aspects of Commonwealth educational co-operation affecting the United Kingdom.
(vi) Special technical assistance projects overseas undertaken at the request of the Governments concerned.
(vii) The handling of requests from United Kingdom dependent territories for technical assistance (including the financing of such assistance) under the Colonial Development and Welfare Acts, and from Commonwealth and foreign countries and international agencies.
(viii) Making arrangements for assistance in the field of research, principally on subjects of importance to United Kingdom dependent territories, or where the United Kingdom has a special contribution to make overseas.
(ix) Supplementing the work of other organisations in assistance to overseas Governments in placing students in the United Kingdom.
(x) Providing assistance in certain instances to overseas Governments on

technical matters relating to air and surface transport, telecommunications and postal services.

(xi) Provision to overseas Governments of specialist advice at their request on a wide variety of subjects, such as agriculture, education, fisheries and medicine.

Apart from certain educational projects the new department will not be responsible for the provision of capital aid, which will remain the responsibility of the overseas departments.

Education. The report with statistics of the Ministry for England and Wales, 1960, has been published (Cmnd. 1439).

Health. Part I of the report of the Ministry for 1960, which concerns Health and Welfare Services, has been published (Cmnd. 1418).

Housing and Local Government. The report of the Ministry for 1960 has been published (Cmnd. 1435).

Pensions and National Insurance. The report of the Ministry for 1960 has been published (Cmnd. 1458).

Highways

New Act

The Highways (Miscellaneous Provisions) Act, 1961 (9 & 10 Eliz. 2, c. 63), received the Royal Assent on August 3, 1961. This Act (which is supplementary to the Highways Act, 1959 (7 & 8 Eliz. 2, c. 25)) makes certain amendments in the law relating to highways, streets and bridges in England and Wales.

S. 1 abrogates the exemption of inhabitants at large and their successors from civil liability for non-repair of highways. In an action against a highway authority in respect of damage resulting from failure to maintain a highway, it shall be a defence for the authority to prove that it had taken reasonable care to secure that the highway was not dangerous (s. 1 (2)); for the purposes of that defence, the court must have regard to certain specified matters, but it shall not be relevant to show that the authority had arranged for a competent person to supervise the maintenance of the highway unless it is also shown that the authority had given him proper instructions for such maintenance and that he had carried them out (s. 1 (3)); in the case of highways in London, references to the highway authority are references to the council responsible for the maintenance of the highway; and any reference to a highway in this section includes a reference to a bridge (s. 1 (4)); this section binds the Crown (s. 1 (5)); s. 1 (6), consequential repeals; this section does not apply to damage resulting from certain works carried out under the Public Utilities Street Works Act, 1950 (14 Geo. 6, c. 39) (s. 1 (7)); s. 1 (8), commencement. S. 2 extends the Minister's power under s. 7 of the Highways Act, 1959, to declare highways to be trunk roads (s. 2 (1)); and the Minister's power to improve trunk roads under the Highways Act, 1959, and the Trunk Roads Acts, 1936 and 1946, shall include power to construct a highway for this purpose, though such a highway must not be separated from the trunk road by intervening land (s. 2 (2)). S. 3 gives local authorities further power to make schemes for the construction of bridges over and tunnels under navigable waters, and applies the relevant provisions of the Highways Act, 1959, to such schemes. S. 4 provides that highway authorities may make contributions to the expenditure of parish councils in maintaining footpaths or bridleways. S. 5 extends the power of highway authorities under s. 82 (1) (2) of the Highways Act, 1959, to plant and protect trees in highways and makes consequential amendments to that section. S. 6 gives power to highway authorities to fill in roadside ditches which are dangerous to highway users and lay pipes in substitution and extends s. 103 (2) (3) of the Highways Act, 1959, so as to make provision for the compensation of persons damaged by the exercise of this power and to penalise persons who open ditches filled in under it. Ss. 256, 308 of the Highways Act, 1959, are to apply

to the exercise of this power (dealing with the authorisation of entry by the authority on to land and with the consent of drainage boards to interference with certain watercourses); but s. 263 of the Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 49) (which prohibits the culverting of certain watercourses without consent of the local authority) does not apply to the exercise of this power (s. 6 (3)). The authority must not exercise the power so as to affect the drainage of land used by a railway or canal undertaking without giving fourteen days' notice to the undertakers and meeting their reasonable requirements (s. 6 (4)); s. 6 (5), definitions. S. 7 provides that it shall be an offence under s. 117 (1) of the Highways Act, 1959, for any person unlawfully to paint or otherwise inscribe or affix any marks on a highway or tree, structure or works on or in a highway. S. 8 provides that a highway authority may remove any dangerous object from the highway forthwith without giving notice or obtaining a removal order under s. 128 of the Highways Act, 1959, and may recover their expenses from the depositor or owner of the object (s. 8 (1)); or may apply to the magistrates' court for an order authorising it to dispose of the object under s. 128 (2). S. 9 makes supplementary provision for the removal of obstructions from highways. S. 10 gives power to the highway authority to require owners or occupiers of land to fell or remove hedges, trees or shrubs which are dangerous to any highway, road or footpath (s. 10 (1)). S. 11 provides machinery for overruling by the highway authority of objections to streets becoming maintainable highways made under s. 202 of the Highways Act, 1959. S. 12 amends s. 210 (2) of the Highways Act, 1959, which deals with street works expenses for premises flanking or backing on the street. S. 13 extends the powers of compIsory acquisition of land for the construction and improvement of highways conferred by ss. 214, 215 of the Highways Act, 1959, in the case of land required for purposes connected with the drainage of a highway. S. 14 gives power to a highway authority to exchange land by agreement to adjust boundaries of highways with or without the payment of equality money (s. 14 (1)); a special procedure is laid down for the publicity and time of such agreements (s. 14 (2)); s. 14 (3) provides for objections to any proposed agreement; where an authority conveys land under such an agreement, then provided any necessary consents by government departments are given, the conveyance shall operate to extinguish the public right of way over the land; and if the land does not belong to the highway authority, then, subject to subss. (6) and (7), the conveyance shall operate to convey the fee simple free of all estates, interests, rights and charges, including the public right of way, which existed before the conveyance (s. 14 (4)); the authority is to compensate any person who suffers damage by being deprived of any interest in the land (other than the public right of way) through such a conveyance (s. 14 (5)); provision is made for the safeguarding of the Postmaster-General and statutory undertakers in cases where land is conveyed under this section which has telegraphic lines or apparatus belonging to statutory undertakers upon it (s. 14 (6)); nothing in the section is to be construed as affecting any mines or minerals under a highway (s. 14 (7)). S. 15, financial provisions. S. 16 provides that the Act shall be construed as one with the Highways Act, 1959 (s. 16 (1)); s. 261 of that Act (which protects members and officers of local authorities from personal liability) applies to this Act (s. 16 (3)); provision is made for the application to this Act of s. 288 of the Highways Act, 1959, which provides for the alteration by order of provisions of local Acts which are redundant or inconsistent with that Act (s. 16 (4)).

The Act, which may be cited together with the Highways Act, 1959, as the Highways Acts, 1959 and 1961, came into force (except s. 1, which comes into force on August 3, 1964) on September 3, 1961, one month after it received the Royal Assent.

The Act does not apply to Scotland or Northern Ireland, or, except ss. 1 and 2, to London.

Housing

Debate

On July 11, 1961, the House of Lords debated housing during the second reading of the Housing Bill. The Bill is based on the Government's White Paper (Cmnd. 1290; [1961] P.L. 183) (233 H.L. Deb. 86–98, 104–143).

Returns

The Housing Returns for Scotland (Cmnd. 1442) and for England and Wales (Cmnd. 1443) have been published.

Summary

A summary has been published of the number of new houses built in Great Britain up to July 31, 1961 (Cmnd. 1480).

See also Government Functions and Appointments (above, p. 399).

Inquiries

Transport

Air. The reports have been published of the inquiry on the accident to Hermes 4 G-ALDC on October 9, 1960, at Southend Municipal Airport (C.A.P. 172) and of the inquiry on the accident to Druine D31 Turbulent G-APKZ on December 6, 1960, at Orpington, Kent (C.A.P. 174).

Railway. The reports have been published on (a) the collision on February 8, 1961, at Royton Station (May 5, 1961); (b) the collision on February 13, 1961, at Baschurch (May 26, 1961); (c) the derailment on February 14, 1961, between Holmes Chapel and Sandbach.

Local Government

Allowances

The Public Authorities (Allowances) Act, 1961 (9 & 10 Eliz. 2, c. 43), received the Royal Assent on July 19, 1961. This Act amends or removes certain restrictions formerly imposed on the allowances payable to members of certain public bodies in England, Wales and Scotland.

S. 1 amends the restrictions contained in s. 113 of the Local Government Act, 1948 (11 & 12 Geo. 6, c. 26), on the payment of allowances to members of the councils of boroughs, urban districts and rural parishes; s. 2 amends s. 113 in its application to Scotland; s. 3 amends the definition of "approved duty" in Part VI of the Local Government Act, 1948; s. 4 removes the restrictions on payments of travelling expenses to members of bodies concerned with hospitals under the National Health Service contained in the National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81), Sched. III, Pt. IV, para. 2 (*c*), and in the corresponding Scottish Acts; s. 5 amends the restrictions on the payment of travelling and subsistence allowances to members of Executive Councils and their committees contained in the National Health Service Act, 1946, Sched. V, para. 3, proviso, and in the corresponding Scottish Act; s. 6 amends the provisions of the National Health Service Act, 1946, and of the corresponding Scottish Act in relation to allowances on attendance at certain conferences and meetings; s. 7 removes restrictions on the entitlement of justices of the peace, members of probation committees and members of case committees set up under the Criminal Justice Act, 1948 (11 & 12 Geo. 6, c. 58), to travelling allowances under ss. 8, 36 of the Justices of the Peace Act, 1949 (12, 13 & 14 Geo. 6, c. 101); s. 8 financial provisions; s. 9 short title, etc.

The Act extends to Scotland, but not to Northern Ireland.

Ss. 1, 2, 3, 7, 8 and 9 came into force on August 19, 1961, and ss. 4, 5 and 6 come into force on such later day as the Minister of Health and the Secretary of State jointly appoint.

The Ministry of Housing and Local Government has issued a Circular directing the attention of local authorities, joint boards, river boards, port health authorities and local valuation panels in England and Wales to the Act (Circular No. 35/61).

Clean Air

The Ministry of Housing and Local Government has issued a Circular drawing the attention of local authorities to the provisions of section 2 of the Clean Air Act, 1956, which provide a defence against prosecution under section 1 of the Act where dark smoke has been emitted from the chimney of any building.

The defence is limited to a period of seven years from the passing of the Act and this means that after July 5, 1963, it will no longer be possible to plead as a defence in any proceedings for an offence under section 1 that the contravention was due to faulty buildings or equipment and to inability to remedy this. The Minister accordingly suggests that local authorities should ascertain to what extent buildings and furnaces in their area have not yet been altered or equipped to meet the provisions of the Clean Air Act and, where necessary, remind those concerned that time is beginning to run out (Circular No. 42/61).

Consumer Protection

The Consumer Protection Act, 1961 (9 & 10 Eliz. 2, c. 40), received the Royal Assent on July 19, 1961. This Act enables the Secretary of State to impose by regulations, subject to negative resolutions in either House of Parliament, safety requirements as to the composition or contents, design, construction, finish or packing of any class of goods, or components or accessories of goods, and as to instructions or warnings to be marked on them or issued with them (s. 1); the sale or the having in one's possession for the purpose of selling of goods, components or accessories not complying with regulations made under s. 1 is prohibited, subject to safeguards for persons and agents possessing or selling goods otherwise than in the course of business, or selling for use abroad, and for persons involved in credit-sales and sales as scrap and sales of goods damaged by fire or flood (s. 2); regulations made under the Act may provide for further exemptions (s. 2 (5)); special provisions relating to hire-purchase agreements are set out in s. 2 (6). S. 3 provides for the enforcement of obligations not to sell or have in possession for the purpose of sale, imposed by virtue of s. 2 as a statutory duty owed to any person who may be affected by contravention of or non-compliance with the relevant requirement, with a maximum fine of £100 for a first offence and a maximum fine of £250 or imprisonment for not more than 3 months or both for a second or subsequent offence; it is a good defence for the accused to show that he had reasonable cause to believe that the requirements of s. 1 had been complied with; the other defence applying to actions for breach of statutory duty are also available; an officer of a body corporate may be guilty of an offence as well as the body corporate if his consent, connivance or neglect is proved in relation to the offence (s. 3 (3)). S. 4 expenses; s. 5 interpretation; s. 6 repeals the Heating Appliances (Fireguards) Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 42), and the Oil Burners (Standards) Act, 1960 (8 & 9 Eliz. 2, c. 58), and contains transitional provisions in relation to the goods subject to those Acts.

The Schedule to the Act contains provisions as to inspection, testing and enforcement by local authorities.

The Act which applies to Scotland, but not to Northern Ireland, came into force on August 19, 1961, one month after the date on which it received the Royal Assent.

Economic Situation

Circular. The Ministry of Housing and Local Government has issued a Circular drawing the attention of local authorities to the statement on the

economic situation made on behalf of the Government by the Chancellor of the Exchequer in the House of Commons on July 25, 1961, and the fuller statement made by him in the subsequent debate on July 26, 1961. The Circular states that one of the measures required for relieving the present stress on the economy is the adjustment of the level of public expenditure, and in this local authorities have a material part to play. Government departments are putting into operation the restrictions on future expenditure announced by the Chancellor, and will be scrutinising very closely all expenditure proposals, including those for new capital works coming to them from local authorities. Ministers hope that the necessary restraint in expenditure by local authorities can be achieved as much by a voluntary action by authorities to slow down the rate of growth of their expenditure as by any restrictions imposed by the Government.

Following are three general considerations:

(*a*) In its central review the Government has been much assisted by the report of the Committee presided over by Lord Plowden on "The Control of Public Expenditure" (Cmnd. 1432) with its broad theme that the growth of public expenditure should be considered and allowed only in so far as the growth of resources enables the increase to be carried. The same principle applies equally in the local field; and each local authority would be well advised to ensure that the piecemeal examination of new projects is accompanied by overall surveys which take all the consequences into account. Growth in services is necessary and desirable, and new expenditures on various projects are part of national policy. But the overall effect on an individual local authority is something which that local authority is best able to assess. Some initial expenditure may be easily afforded in the first year of undertaking a long-term project; but what matters is the commitment as it builds up in later years. If authorities find that they are being asked to do more in total—or to do it faster—than their own judgment supports, they should say so. They should satisfy themselves that the total build-up of their expenditures, looking several years ahead, will be within their resources as they can foresee them, assuming grants would remain on the present basis.

(*b*) In any public service which works to an annual budget there is a natural desire to make full use of the annual permitted quota of expenditure. On occasion, that can lead to ill-considered expenditure motivated by a desire to use up the quota. Whatever the circumstances, expenditure of this kind should be viewed by the authority with suspicion. In present circumstances, the abandonment of an unused quota is a specially valuable relief.

(*c*) The check on the rate of growth of capital expenditure to be applied by departments pays regard to the national load on the building and civil engineering industries. But an undue concentration of public projects in a particular local area can still lead to a gross overload locally and in consequence a sharp increase in prices. Any authority which finds that prices that seem to them too high are being offered in tenders for contracts should, in their own as well as the national interest, decline acceptance of such tenders and defer the project until lower quotations can be got (Circular No. 37/61).

Loans. The Treasury (Loans to Local Authorities) (Interest) (No. 2) Minute, 1961, increases the rates of interest chargeable on loans advanced to local authorities from the local loans fund on the security of local rates (S.I. 1961 No. 1521).

Elections

In *Re* WOLVERHAMPTON LOCAL GOVERNMENT ELECTION PETITION (June 30 and July 28, 1961) a mayor and alderman was eligible for re-election as an

alderman. At the election, the mayor left the chair as mayor, and another member of the council presided. The mayor then sat in the benches reserved for the aldermen, and took part in the election of the aldermen. The voting resulted in a tie. The member presiding then gave a casting vote. The Divisional Court (Gorman and McNair JJ.) *held* that the case was a proper one for a case to be stated. On the case stated the Divisional Court (Glyn-Jones and Thesiger JJ.) *held* that a mayor is only entitled to be regarded as present at a meeting of the council over which it is his duty to preside if he is in the chair, since the office of mayor is whole and indivisible; therefore, the mayor's vote not being counted, the voting was such that there did not arise a case for the exercise of the casting vote, and the results of the election should be determined accordingly.

Finance

Rating and valuation. The Rating and Valuation Act, 1961 (9 & 10 Eliz. 2, c. 53), received the Royal Assent on July 27, 1961. This Act has four main purposes. S. 1 provides for the abolition of the derating of industrial and freight-transport hereditaments. S. 2 empowers the Minister of Housing and Local Government to derate private houses and similar hereditaments for the period of the valuation lists which are due to come into force on April 1, 1963. Ss. 11 and 12 provide a system for the rating of charities and similar bodies, and are founded largely on the recommendations contained in the Report of the Committee on the Rating of Charities and Kindred Bodies (the Pritchard Committee) (Cmnd. 831). Pt. II of the Act (ss. 18–23) together with Scheds. II and III provide a complete and complex formula for the assessment of the rateable values of statutory water undertakings.

Apart from these provisions of major importance, the Act affects the existing law and practice of rating in many of its aspects. S. 3 empowers the Minister of Housing and Local Government to provide by order for the valuation for rating of a number of classes of hereditaments which are, by the present law or practice, valued by reference to profits. S. 4 empowers the Ministers of Housing and Local Government and of Education to make regulations providing for the valuation for rating of county and voluntary school premises. S. 5 contains provisions which effect certain amendments as to the plant and machinery which is to be deemed to be part of a hereditament for rating purposes. S. 6 is designed to amend the existing law as to the ascertainment of the gross value for rating purposes of flats or other buildings in multiple occupation where general services are provided by the landlord. S. 7 affects the valuation of hereditaments which are, temporarily, only partly occupied. S. 8 contains miscellaneous amendments of the rules whereby net annual values and rateable values are to be ascertained. S. 9 amends the existing law as to the valuation for rating of advertising stations. S. 10 removes an anomaly as to the valuation for rating of certain burial grounds which has hitherto existed. S. 13 provides relief from rates for parks provided or managed by local authorities and held available for free and unrestricted use by members of the public. S. 14 provides for the abolition of rate books. S. 15 contains a number of amendments of the present law relating to the rating of owners of hereditaments in the place of occupiers. S. 16 amends the law as to the withholding of rates pending the settlement of proposals for the alteration of the valuation list. S. 17 empowers rating authorities to refund overpayments of rates in certain circumstances. S. 24 empowers the making of contributions in aid of rates in respect of court and other buildings connected with the administration of justice which are not otherwise rateable. S. 25, minor and consequential amendments. S. 26 financial provisions. S. 27 deals with the making of orders and regulations under the Act. S. 29, short title, repeals and savings, and extent. For definitions, see s. 28 and, as regards Pt. II, s. 22.

The Act, which does not apply to Scotland or Northern Ireland (s. 29 (4)), came into force on July 27, 1961, the date on which it received the Royal Assent.

An art gallery was vested in Hull Corporation "upon trust to permit the same to be used and enjoyed by the citizens of the said city . . . and the public generally . . . for the exhibition of works of art in perpetuity." The public was admitted free to two-thirds of the building, which was under the care of a director, assistant director, and staff. *Held*, that the corporation was liable to rates on the gallery as its occupier because the public's rights of user did not exclude beneficial occupation of it by the corporation, which was in *de facto* occupation of it.

Per Lord Guest: The test for beneficial occupation is not whether a profit could be made but whether the occupation is of value: KINGSTON-UPON-HULL CORPORATION *v.* CLAYTON [1961] 3 W.L.R. 497; [1961] 3 All E.R. 118, H.L.

Land was used for drying green timber by stacking it in such a way that there was a free flow of air round it so that in time it dried of its own accord. The Lands Tribunal held that the land was derated as an industrial hereditament within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. On appeal, *held*, that as no one was employed to dry the timber, which dried itself, the land was primarily occupied and used for purposes of storage within proviso (*d*) to s. 3 (1) and accordingly was not an industrial hereditament and was not entitled to be derated: BUNCOMBE v. BALTIC SAWMILLS CO. [1961] 1 W.L.R. 1181; [1961] 3 All E.R. 272, C.A.

The Lands Tribunal found as facts that two playing fields used by a large number of schools contained buildings the primary purpose of which was for changing and their use for teaching was ancillary and subordinate to use of the fields as playing fields (that is, the buildings were appurtenances to the playing fields rather than *vice versa*) although viewed as a whole the two hereditaments were educational establishments. *Held*, dismissing the appeals, that the buildings were not hereditaments occupied with or for the purposes of an educational establishment within the meaning of s. 22 (4) of the 1925 Act and were, accordingly, not entitled to be assessed to the benefit of a gross annual value under s. 22 (1) (*a*): PARKIN *v.* LONDON COUNTY COUNCIL; ROBINSON *v.* LONDON COUNTY COUNCIL (1961) L.G.R. 380, C.A.

Local Government Commission

East Midlands General Review Area. The Report and Proposals of the Local Government Commission (Chairman: H. D. Hancock) have been published for the East Midlands General Review Area, with Maps (H.M.S.O. 75–83).

The Commission recommended to the Ministry of Housing and Local Government the creation of two new administrative centres, by combining Cambridgeshire with the Isle of Ely and Huntingdonshire with the Soke of Peterborough. The proposals of the Commission also include the amalgamation of Leicestershire and Rutland and the promotion to county borough status of Luton. The Minister is now inviting comments on the report and, if there are objections, public local inquiries will follow. At this stage the Minister has formed no view on what changes, if any, he will ultimately propose to Parliament.

The final proposals are, in important particulars, different from draft proposals published in February, 1960, when the Commission suggested that the city of Cambridge should become a county borough, and that the rest of Cambridgeshire, with the Isle of Ely, Huntingdonshire and the Soke of Peterborough, should form a single administrative county. The Commission say that discussions clearly indicated that this scheme for two new counties (instead of one) would attract a considerable measure of support—which was not forthcoming for the draft proposals. They did not think, however, that the two-county scheme would be workable unless the city of Cambridge remained part of the county, and under their final proposals Cambridge would remain a non-county borough. "We came to the conclusion that, if there had to be a choice,

the improvement of county government should take priority before the claims of the city."

The Commission propose that Rutland should be amalgamated with Leicestershire in a single administrative county to be known as "Leicester and Rutland." They give detailed reasons for their belief that Rutland is too small in terms of population and resources to be a fully effective unit of local government, either now or in the future, and is too dependent on the services and institutions of other authorities and bodies. But they appreciate that Rutland does not want to lose its identity and they have abandoned the suggestion, included in their draft proposals, that Ketton rural district should be separated from the rest of the county. They suggest that Rutland might well form a single county district in the new administrative county, which would have the advantage of providing "a Rutland council to which many of the traditions and loyalties could attach themselves."

For Luton, the largest non-county borough outside the Metropolitan area, the Commission recommend county borough status with some boundary extensions to take in land on the fringes used for municipal purposes, and to include some suburban areas to the north of the town that are outside the present boundary.

Extensions are proposed to the county boroughs of Leicester and Northampton to take in outlying suburbs, and various adjustments have been proposed for the county boundaries, of which the most substantial is that Royston, now in Hertfordshire, should form part of the new county of Cambridgeshire.

The Commission have not made any proposals for the boundaries with Lincolnshire, Norfolk and Suffolk. In their draft proposals the Commission had included Stamford, Lincolnshire (Parts of Kesteven), in the amalgamation involving Cambridgeshire, Huntingdonshire, the Soke of Peterborough and the Isle of Ely. They had also suggested the transfer of some of the parishes around Newmarket from Cambridgeshire to West Suffolk. In their final report these matters are left open, to be considered during the review of Lincolnshire and East Anglia, which has already been announced.

The report has been sent to all local authorities in and adjoining the areas affected, and to other public authorities who appear to be concerned. Copies are available for public inspection at the offices of these local authorities, and it is on sale through bookshops or direct from Her Majesty's Stationery Office. Local authorities, other bodies and individual persons had until the end of October to make representations to the Minister of Housing and Local Government on any of the Commission's proposals.

South Western General Review Area. The Local Government Commission have sent their draft proposals for the South Western General Review Area to the Local Authorities and other organisations concerned.

The South Western General Review Area comprises the Isles of Scilly, the administrative counties of Cornwall, Devon, Gloucester and Somerset and the county boroughs of Bath, Bristol, Exeter, Gloucester and Plymouth.

The draft proposals are set out in a statement and a number of maps. A brief explanation is given in the statement of the main considerations the Commission had in mind in putting forward these draft proposals. (This statement should not be confused with the detailed statutory report that the Commission are bound to submit to the Minister at a later stage.)

The public will be able to see the statement and maps affecting their area at their local council offices.

A letter to authorities and bodies, accompanying the proposals, explains that they are at this stage provisional. Local authorities and others have two months in which to consider the draft proposals and make representations. The Commission will then hold local conferences at which the representations will be discussed. After that the Commission will draw up the final proposals, and submit them, with their report, to the Minister of Housing and Local Government. No proposals for change can be put into effect except by order

of the Minister which he must lay before Parliament together with the Commission's report. (The procedure to be followed by the Minister is set out in the Act.)

London

Royal Commission. On July 25, 1961, the Minister of Housing and Local Government in an oral answer, stated that the Government have the Royal Commission's report and the representations of local authorities on it under consideration but that it would not be possible to make an announcement before the Recess. In answer to a supplementary question the Minister added that the political parties could take it for granted that there will be elections in 1962 (645 H. C. Deb. 192–193).

Police

Metropolis. The Report of the Commissioner of the Police for the Metropolis has been published (Cmnd. 1440).

Police Federation. The Police Federation Act, 1961 (9 & 10 Eliz. 2, c. 51), received the Royal Assent on July 27, 1961.

This Act amends the law relating to the Police Federation by providing that chief inspectors and other members of the metropolitan police force who are not members of the Federation shall become members (s. 1); s. 2 and the Schedule provide for the separate representation of the interests of policewomen on the boards and at conferences and committees of the Federation; s. 3, short title, etc.

The Act, which applies to Scotland but not to Northern Ireland, comes into force on a day or days to be appointed.

Royal Commission. The Minutes of Evidence taken before the Royal Commission on the Police (Chairman: Sir Henry Willink, Bt., M.C., Q.C.) have been published for Days 11–14 (H.M.S.O. 73–36–11 to 14).

Public Health

High Court Proceedings. High Court proceedings by a local authority under s. 100 of the Public Health Act, 1936, to secure the abatement or prohibition of a nuisance may be begun by a writ issued before the authority resolves that it is of opinion that summary proceedings would afford an inadequate remedy, at any rate if the resolution follows the writ by so short an interval that it can be inferred that the authority held that opinion at the date of the writ.

A local authority issued a writ in the High Court under s. 100 of the Public Health Act, 1936, claiming an injunction to restrain a public nuisance. Three days later the authority resolved that it being of the opinion that summary proceedings would afford an inadequate remedy, High Court proceedings should be taken. On motion for the injunction, *held* that the action was properly instituted and was not a nullity by reason of the fact that the authority had not at the date of issuing the writ recorded its opinion under s. 100: WARWICK RURAL DISTRICT COUNCIL *v.* MILLER-MEAD, MILLER-MEAD *v.* WARWICK RURAL DISTRICT COUNCIL [1961] 3 W.L.R. 737; Widgery J.

New Act. The Public Health Act, 1961 (9 & 10 Eliz. 2, c. 64), received the Royal Assent on August 3, 1961.

This Act makes many miscellaneous amendments to the complex law of public health. With the exception of (i) provisions relating to building regulations in ss. 4 to 11, (ii) provisions relating to trade effluents in ss. 55 to 71, and (iii) a provision in s. 79 bringing an end to the duty of local authorities, including those in London, to make reports about the enforcement of the public health provisions relating to canal boats, all the substantive sections in this Act are derived from provisions which have frequently been included in local Acts and in particular are to be found in many instances in an H.M.S.O.

publication, *Model Clauses* (Revised edition, 1960). Because many of these provisions are already in force in local Acts, the Minister is given power to amend local Acts by s. 82.

The main change made, by ss. 4 to 11, is the replacement, by centrally made regulations of the building by-laws at present made by borough and urban rural district councils.

Part V of this Act amends the law relating to the discharge of trade effluents into public sewers.

Local Act provisions which have been adopted deal with sewers and drains, sanitary conveniences, buildings and structures, filthy or verminous premises or articles, prevention and notification of disease, streets, parks and open spaces, discharge of steam, derelict petrol tanks, pigeons and other birds in built-up areas, and pleasure fairs and roller skating rinks.

Ss. 1–3 deal with construction, interpretation and extent: much of the interpretation is to be found in other Acts.

Ss. 4–11 deal with building regulations ; in particular s. 4 gives the power to make building regulations and s. 5 deals with the application to building regulations of certain provisions in the Act of 1936 concerning building by-laws. Ss. 6–8 provide for the relaxation of building regulations, for a right of appeal and for advertisement of any proposal to relax building regulations. S. 9 provides for consultation with a Building Regulations Advisory Committee and other bodies and ss. 10 and 11 deal with minor, transitional and consequential amendments.

Ss. 12–23 deal with sewers, drains and sanitary conveniences. Ss. 12 and 13 deal with contributions to the cost of sewering a highway or land subsequently laid out as a street ; s. 14 gives power to deal with attempts to evade liability to contribute under ss. 12 and 13 ; s. 15 provides for the recovery of the cost of maintaining public sewers ; ss. 16–19 deal with the examination and testing of drains, the remedying of stopped-up drains, the repair of drains and private sewers and the disconnection of drains. S. 20 provides a fine for improper construction or repair of water closets or soil pipes; s. 21 provides for closet accommodation for separate dwellings ; s. 22 gives power to cleanse or repair drains and s. 23 provides for local authorities lending temporary sanitary conveniences. Ss. 24–33 deal with buildings and structures. S. 24 applies s. 58 of the Act of 1936 to buildings constituting a danger to persons in streets ; s. 25 deals with emergency measures to deal with dangerous buildings, s. 26 with defective premises, s. 27 with ruinous and dilapidated buildings and neglected sites (see also s. 34) ; s. 28 with new buildings overreaching adjacent chimneys, s. 29 with local authorities' powers in relation to demolition, s. 30 with cellars and rooms below subsoil water level, ss. 31 and 32 with food storage accommodation in new and existing houses and s. 33 with the provision of bathrooms.

S. 34 deals with accumulation of rubbish (see also s. 27). Ss. 35–37 deal with filthy or verminous premises or articles. Ss. 38–42 deal with the prevention and notification of disease. S. 38 gives justices power to order a medical examination. S. 39 deals with information to be furnished by occupiers in cases of notifiable disease or food poisoning, s. 40 with the exclusion of children from places of entertainment or assembly, s. 41 with compensation for stopping employment to prevent spread of disease and s. 42 with inducements to children offered by dealers in rags and old clothes. S. 42 overrules *Daly* v. *Cannon* [1954] 1 W.L.R. 261.

Ss. 43–51 give various miscellaneous powers in regard to streets, including guard-rails, barriers, street lamps, forecourts, pavement lights, vehicles on footways and litter bins. Ss. 52–54 deal with the management of parks and pleasure grounds, the closing of parks and pleasure grounds, boating pools and lakes. Ss. 55–71 deal with trade effluents. S. 55 gives power to make charges for trade effluents in cases hitherto exempted; s. 56 provides for the withdrawal of certain exemptions after two years' disease and s. 57 deals with the installation of inspection chambers and meters on exempted premises. S. 58 withdraws

the earlier power to make trade effluent by-laws Ss. 59–61 provide for attaching conditions to consents to discharge trade effluents for variations of those conditions, for appeals and for the postponement of the right to discharge trade effluents in special cases. Ss. 63–65 deal with farms, premises used for scientific research and laundries and ss. 66–71 deal with supplemental matters in regard to trade effluents.

Ss. 72–81 deal with miscellaneous matters, such as the discharge of steam being capable of being a nuisance, derelict petrol tanks, pigeons and other birds in built-up areas, by-laws as to pleasure fairs, skating rinks, pleasure boats and hairdressers and barbers, water supply to houses, reports regarding canal boats, the meaning of " refreshment house " and the summary recovery of damages for negligence.

Ss. 82–86 deal with supplemental matters including giving the Minister of Housing and Local Government power to amend local Acts of Parliament.

The Act received the Royal Assent on August 3, 1961. The building regulation provisions do not come into force until the Minister so appoints. The remaining provisions came into force on October 3, 1961.

The Ministry of Housing and Local Government has issued a Circular drawing the attention of local authorities to various provisions contained in the Public Health Act, 1961.

The Minister has told local authorities that it will be some time before building regulations which, except in the administrative County of London, will apply to the whole of England and Wales and replace existing local authority by-laws, can be laid before Parliament and before a date can be appointed to bring them into force. For the present, building by-laws will continue.

The provisions about trade effluents extend the powers of local authorities to make charges for such effluents and to attach conditions, or vary existing conditions to their consent for discharges of trade effluents. They extend the definition of trade effluent to include effluents from land or premises used for agricultural or horticultural purposes or for scientific research or experiment.

The Minister draws local authorities' attention to representations made to him during the Act's progress through Parliament. There has been a strong plea, says the Circular, that local authorities ought to make known the basis on which charges for trade effluents are calculated. It continues " The Minister realises that in a number of cases local authorities are content with a charge which approximates to or is even less than the cost of treating ordinary domestic effluent and that in these instances there may be little need for detailed explanation. Where, however, they are making a special charge, for an effluent which is difficult to treat, it seems right that they should make their calculations known as plainly as they can to the trader." By so doing the authorities may well avoid unnecessary appeals to the Minister against the charges they have fixed. (Circular No. 46/61).

Rivers

The Rivers (Prevention of Pollution) Act, 1961, received the Royal Assent on July 27, 1961.

This Act makes further provision for maintaining or restoring the wholesomeness of the rivers and other inland or coastal waters of England and Wales.

S. 1 extends to pre-1951 discharges the control which river boards exercise over streams, from a date not later than September 27, 1962, to be appointed; s. 2 gives protection while applications are being dealt with ; s. 3 provides for the furnishing of relevant information to river boards ; s. 4 exempts discharges complying with certain conditions ; s. 5 provides for the review and variation of conditions governing discharges and new outlets ; s. 6 provides for appeals to the Minister as to the unreasonableness of withholding consent or of terms imposed by a river board, and for the statement of a special case to the High Court in certain circumstances ; ss. 7, 8 contain supplementary provisions : s. 9 applies ss. 1–3 of the Act to estuaries and tidal waters, with modifications; s. 10

provides for the use of samples of effluent taken in prescribed places as evidence in proceedings; proceedings under the Act shall only be taken after one month's notice has been given and then only by a river board, or by any other person with the consent of the Attorney-General (s. 11); s. 12 restricts the disclosure of information, under penalties; s. 13, interpretation; s. 14, financial provisions; s. 15, short title, repeals, etc.

The Act and the Rivers (Prevention of Pollution) Acts, 1951 and 1960 (14 & 15 Geo. 6, c. 64; 8 & 9 Eliz. 2, c. 54), may be cited together as the Rivers (Prevention of Pollution) Acts, 1951 to 1961.

The Act, which does not apply to Scotland or Northern Ireland, came into force on September 27, 1961, two months after the date on which it received the Royal Assent.

The Ministry of Housing and Local Government has issued a Circular explaining the Act (Circular No. 39/61).

Scotland

Sheriffs. The Sheriffs' Pensions (Scotland) Act, 1961 (9 & 10 Eliz. 2, c. 42), received the Royal Assent on July 19, 1961. This Act amends the law with respect to the pensions attributable to the office of sheriff and salaried sheriff-substitutes, to regulate the age of retirement from such offices, and to regulate the time at which payment may be made of these pensions and of the salaries attaching to the said offices.

Monopolies and Restrictive Practices

Monopolies Commission

Supply of Cigarettes and Tobacco. The report of the Monopolies Commission (Chairman: R. F. Levy, Q.C.) on the supply of cigarettes and tobacco and of cigarette and tobacco machinery has been published (H.C. 218 of 1960–61). The two references were made to the Monopolies Commission on November 29, 1956, and as the two subjects were closely connected the commission have dealt with them both in one report.

The commission found that the Imperial Tobacco Co. (of Great Britain and Ireland) Ltd. supply nearly two-thirds of the total home supplies of cigarettes and tobacco, but although their share was 63·4 per cent. in 1959, it had declined each year since 1955 when it stood at 78·8 per cent. At the time of the preparation of the report no other manufacturer was found to be supplying as much as one-third of the total home supplies, although Gallaher Ltd. were not far below that figure (their share having risen year by year from 11·8 per cent. in 1954 to 29·3 per cent. in 1959).

The Imperial Tobacco Co. have financial interests in two other tobacco manufacturers, the British-American Tobacco Co. Ltd. (which supplies overseas markets only) and Gallaher Ltd. The company also controls (through its subsidiary, Ardath (U.K.) Ltd.), the manufacture and sale of Ardath brands in the United Kingdom market.

The main conclusions and recommendations of the commission are:

(1) The monopoly position of Imperial, as such, does not operate against the public interest nor may it be expected to do so;

(2) The retention by Imperial of its shareholding in Gallaher operates, and may be expected to operate, against the public interest. The commission recommend that Imperial should divest itself of any direct or indirect financial interest in Gallaher;

(3) Imperial's practice of allowing a bonus to distributors conditional on the grant to the company of a proportion of their display facilities operates, and may be expected to operate, against the public interest. The commission recommend that

(a) Imperial should terminate its existing bonus agreements,

(b) any bonus or allowance granted to a distributor by any tobacco manufacturer, whether by written agreement or otherwise, should in future be related solely to that distributor's turnover in the products of the manufacturer concerned.
(c) any such bonus or allowance should be completely dissociated from the grant of continuing advertising or display facilities by distributors (special arrangements for " campaign " advertising are, in the commission's view, in a different category and unobjectionable),
(d) no tobacco manufacturer should in future enter into an arrangement with a distributor the effect of which is that, if the distributor advertises a competing product, he must also advertise the manufacturer's product.

The largest supplier of cigarette and tobacco machinery is the Molins Machine Co. Ltd., in which Imperial and British-American Tobacco each hold 25 per cent. of the equity. Of total home supplies of machinery in 1958 56·5 per cent. was supplied by the Molins Machine Co. Ltd., and 40·5 per cent. was supplied to Imperial. No other manufacturer supplies, nor does any other user take, as much as one-third of the total United Kingdom supplies.

The report is unanimous, subject to a note of dissent by Professor G. C. Allen, in relation to resale price maintenance. The commission conclude that, on balance of a number of considerations, and so long as competition between manufacturers continues on the present scale, this practice is not against the public interest in the cigarette and tobacco industry. Professor Allen disagrees with this conclusion and considers that the practice should be abolished in this industry.

On July 5, 1961, the President of the Board of Trade, in a written answer, stated that as soon as the industry had had time to consider the report, he proposed, as a first step, to consult it on the various matters to which the report gave rise. He would then see how far the industry was prepared to give effect to, or co-operate in giving effect to, its conclusion (643 H.C. Deb. *132–134*).

Wallpaper. On July 13, 1961, the President of the Board of Trade, in a written answer, stated that he proposed to refer to the Monopolies Commission for investigation and report the supply of wallpaper in the United Kingdom (644 H.C. Deb. *65*).

Restrictive Practices Court

Decisions. Where a proposed amendment to pleadings is agreed after the application for directions, it need not be the subject of a separate application, but may be brought to the attention of the court for approval at the next convenient opportunity: *Re* Reinforcement Conference Members' Application. Practice Direction [1961] 1 W.L.R. 1007, R.P.Ct.

Per curiam: 1. If a restrictive agreement is to be justified on the ground that it prevents an invisible debasement of the quality of the goods in question it must be proved that without the agreement the debasement would occur: the mere risk that it might occur is not enough. 2. It is doubtful whether a benefit of lower prices at times of high demand can be so isolated as to make it a specific and substantial benefit to which the court can pay attention since, correspondingly, in periods of low demand prices are higher than they otherwise would be.

An association of manufacturers of linoleum, some of which were very well established, sought to justify their restrictive trade agreement on the grounds that if it were abrogated there would be a " price war," that the quality of the goods in question would decline in a way which could not be detected by the members' customers, that the agreement brought lower prices in times of high demand, and that if the agreement went a certain international convention would be abandoned, with consequent loss of exports. *Held*, that none of those grounds were made out on the evidence: *Re* Linoleum Manufacturers'

Association's Agreement [1961] 1 W.L.R. 986; [1961] 2 All E.R. 897, R.P.Ct.

Where an agreement has been held to be contrary to the public interest, and it is sought to restrain a new agreement being made to the like effect, it must be shown that the new agreement is one which the court would necessarily conclude to be contrary to the public interest for the same reasons as the original agreement.

By an agreement between its members, an association (a) imposed fixed prices for sales of bolts and nuts to ordinary users and (b) prescribed a procedure for quotation of prices to large users such as government departments. After the restrictions in (b), but not the restrictions in (a), had been declared to be contrary to the public interest, the members of the association proposed to enter into a new agreement applying the restrictions in (a) to sales to large users. The Registrar sought an injunction to restrain the new agreement being made. *Held*, there was no jurisdiction to grant the injunction: *Re* Black Bolt and Nut Association's Agreement (No. 2) [1961] 1 W.L.R. 1139; [1961] 3 All E.R. 316, R.P.Ct.

A newspaper proprietors' association and a federation of retail newsagents operated an agreement which provided that London daily newspapers should only be sold at places where they were sold in 1944, or at places authorised by the association. Before judgment was delivered the federation notified the registrar of its intention to maintain a list of recognised selling points. *Held*, (1) the agreement was contrary to the public interest; (2) that the federation must be restrained by injunction from drawing up the proposed list of recognised selling points as it was a preparatory step to restricting entry of persons into the retail newspaper trade: *Re* Newspaper Proprietors' Association's and National Federation of Retail Newsagents, Booksellers and Stationers' Agreement [1961] 1 W.L.R. 1149, R.P.Ct.

National Health Service

Central Health Services Council

Report of the Council for 1960 has been published, preceded by a Statement by the Minister of Health (H.C. 250 of 1960–61).

Debate

On July 11, 1961, the House of Commons in Committee of Supply debated the National Health Service (644 H.C. Deb. 219–346).

Superannuation

England and Wales. The National Health Service (Superannuation) Regulations, 1961, consolidate with amendments the regulations in force under section 67 (1) of the National Health Service Act, 1946, which provide for the superannuation of persons engaged in the National Health Service (except employees of local health authorities and local education authorities) (S.I. 1961 No. 1441). The Ministry of Health has issued a Memorandum on the Regulations (H.M. (61) 81).

Scotland. The National Health Service (Superannuation) (Scotland) Regulations, 1961, consolidate with amendments the regulations in force under section 66 (1) of the National Health Service (Scotland) Act, 1947, which provide for the superannuation of persons engaged in the National Health Service in Scotland (except employees of local health authorities and education authorities) (S.I. 1961 No. 1398).

The two sets of regulations were approved by the House of Commons on July 17, 1961 (644 H.C. Deb. 1014–1018), and by the House of Lords on July 20, 1961 (233 H.L. Deb. 784–785).

See also Tribunals and Judicial Functions of Ministers (below, p. 425).

NATIONAL INSURANCE

Decisions of the Commissioner

Absence from Great Britain for the purpose of convalescence—not for the specific purpose of being treated: Decision No. R(S) 5/61.

Absence from Great Britain—specific purpose of being treated not fulfilled and not the sole purpose of absence: Decision No. R(S) 6/61.

Incapacity for work. A farmer who normally ran his small dairy farm of about 50 acres with the aid of one man had suffered injury to his left shoulder, as a result of which he was unable to carry out a number of duties such as using the milking machines, the tractor and wheelbarrow and doing heavy lifting. He had to employ an extra man at week-ends to do work which, before his injury, he had done himself. He was able to let in the cows, feed the poultry, drive a car, keep the accounts and do such little supervising work as was necessary. *Held* that, applying the test in R(S) 11/51, the claimant was not incapable of work. It was not possible to say that the work that he was able to do was so trivial as to be negligible. Some unreported decisions compared: Decision No. R(S) 2/61.

Late claim—fear of doctors and hospitals. A claimant who had never previously made a claim for sickness benefit had been incapable of work for over four months before he could be persuaded to see his doctor. He had been severely wounded during the 1914–1918 war and as a result of the painful treatment for his multiple wounds and his subsequent illnesses he had developed a genuine aversion to doctors and hospitals. *Held* that the claimant had shown good cause for delay in making his claim for benefit because it was a genuine phobia that prevented him from seeing his doctor, although he was obviously incapable of work: Decision No. R(S) 7/61.

Late claim—increase for wife. A widower claimed retirement pension when he was deemed to have retired at 5.7.58, but his pension was extinguished by earnings. He remarried but made no claim for an increase of pension for his wife and did not notify the Ministry of his change of status. Pension subsequently became payable regardless of earnings when he reached the age of 70 but it was not until six months later that he claimed the increase. He stated that he first learned that he was entitled to an increase when his wife called at the National Insurance Office on another matter. He had had no means of knowing of his title except on the basis of a pamphlet he had received more than five years earlier when he was a widower. He contended that inquiry on July 5, 1958, or even when he married, about his right to such an increase would have been useless as he was not then entitled to a pension at all and when his pension became payable there was nothing to indicate that the pension paid to him was not the maximum to which he was entitled. He also contended that his duty to make inquiries arose only on these specific occasions, on each of which he had good reason for his failure to do so. *Held* that good cause for his delay in claiming was not proved. It would have been reasonable to expect him to make inquiry about his potential entitlement on the occasion of his marriage and, when he began to receive his pension, to query whether the sum being paid to him took into account the fact that he was married: Decision No. R(P) 5/61.

Maternity allowance—power to review insurance officer's decision where made in ignorance of material fact: Decision No. R(G) 2/61.

Minister's question. A claimant for maternity allowance contended that a deficiency in her contribution record was due to misdirection by the Ministry. She appealed to a local tribunal against the disallowance of her claim by the insurance officer. By a majority decision the local tribunal allowed her appeal accepting her contention and purporting to decide the contribution question in her favour. On appeal by the insurance officer the Commissioner directed that the contribution question be referred to the Minister for decision. The Minister

decided that the contribution conditions were partially satisfied. *Held* that maternity allowance was payable at a reduced rate. As a Minister's question had arisen the local tribunal had no jurisdiction to decide it and should have directed the insurance officer to refer it to the Minister for decision. Guidance given as to the circumstances in which a contribution question arises. Previous decisions cited: Decision No. R(G) 1/61.

Misconduct. A night sister at a hospital was dismissed from her employment because, according to her employers, she had slept on duty and had failed to do her rounds or instruct nurses working under her. This conduct was not described in more detail and the charges were denied by the claimant. Her dismissal was confirmed by the Hospital Management Committee after a hearing at which she was present and was assisted by her trade union representative. Later the secretary to the Hospital Management Committee declined to provide further information. *Held*, by reference to Decisions R(U) 2/60 and R(U) 10/54, that misconduct had not been proved. The allegations were denied by the claimant and were not supported by evidence brought before the statutory authorities. The decision of the Hospital Management Committee, that the claimant's dismissal be confirmed, could not in itself be taken as evidence establishing misconduct. Even if the findings of fact had been given upon which the Committee's decision had been based it would have been desirable that the most direct evidence of the facts in question should have been adduced. There is no parallel between a conviction for an offence by a court of law and the findings of a body such as the Hospital Management Committee: Decision No. R(U) 7/61.

A labourer was dismissed from his employment, after previous warning, because of unauthorised absences from work without reason given to his employer. The employment was harmful to his health, and he had absented himself so as to attend at the employment exchange for the purpose of seeking more suitable employment. *Held* that he was disqualified for one week. His repeated absences were undoubtedly misconduct, but he was justified in trying to get work elsewhere. In regard to seeking leave of absence the Commissioner acknowledges the difficulty of a man who wants time off to look for another job: Decision No. R(U) 8/61.

Normal course of working—day and night shifts in alternate weeks: Decision No. R(U) 1/61.

Retirement pension. The sole director of a limited liability company carrying on business as bakers and confectioners, who had previously taken a major part in the business, declared in July 1958 that she intended to retire on October 4, 1958, when she would work in the shop on Fridays and Saturdays only for hours totalling 12 per week. She carried out her intention and, except for the 12 hours, the work previously done by her was done by her husband and the assistant. She lived on the premises. Medical evidence showed that she became unfit to continue work in March 1959. *Held* that claimant could be treated as retired from her 60th birthday on October 25, 1958. The extent to which she, although owner of the business, participated in it was not inconsistent with retirement: Decision No. R(P) 4/61.

Arrears due to a retirement pensioner and contained in pension orders payable weekly but not cashed at the date of her death were claimed by her husband. The uncashed order book had been found among her effects. The claimant explained that the reason why the orders were not cashed was that he had been wrongly advised at the national insurance office that his wife was not entitled to draw her pension until he became entitled to pension. *Held* that the sum payable to the claimant was that part of the arrears of which the right to payment had not been extinguished at the date of his wife's death. The provisions enabling the extinguishment date to be extended could not be successfully invoked in the circumstances of the case: Decision No. R(P) 6/61.

Sickness Benefit. The wife of a sickness benefit claimant who claimed an

increase of benefit for her was a working partner in a grocery business from which she received interest on her share of the capital plus half the net profit which remained after deduction of her interest and the salary of the other partner. In the year ending March 1959 she incurred expenses in changing the business to a television and electrical business. *Held*, that the interest on her share of the capital invested, which the income tax authorities allowed her to treat as earned income, was earnings for national insurance purposes and that no deduction from her share of the profits could be made for (1) the cost of travelling between her home and her business premises (2) the cost of employing domestic help in the home or (3) the capital expenses involved in changing the nature of the business. The cost of overalls and their laundering were permissible deductions: Decision No. R(S) 3/61.

Trade Dispute. The claimant was a welder who lost employment when riveters went on strike at the shipyard where he was employed. The strike arose from a dispute concerning the transfer of redundant riveters to work performed by other tradesmen, including welders. The principle of interchangeability had been agreed by the executive of the claimant's trade union, and the claimant contended that the dispute was solely between the employers and the riveters about rates of pay of the latter. There was evidence, including reports of meetings, that, notwithstanding the agreement, the rank and file of union members refused to accept the redundant riveters. *Held*, that the claimant was disqualified. The dispute which caused the stoppage of work was about interchangeability in practice. Members of the claimant's grade or class clearly participated and were directly interested in that dispute. In the matter of direct interest an interchangeability dispute is on a par with a demarcation dispute (Decision R(U) 1/60): Decision No. R(U) 6/61.

Germany

The Family Allowances, National Insurance and Industrial Injuries (Germany) Order, 1961, gives effect in England, Wales and Scotland to the Convention and Protocol (set out in the Schedules) made between the Governments of the United Kingdom and of the Federal Republic of Germany and modifies the Family Allowances Acts, 1945 to 1959, the National Insurance Acts, 1946 to 1960, and the National Insurance (Industrial Injuries) Acts, 1946 to 1960, in their application to persons affected by the Convention and Protocol (S.I. 1961 No. 1202).

The National Insurance (Germany) Order, 1961, gives effect in England, Wales and Scotland to the Convention on unemployment insurance and Protocol (set out respectively in the First and Second Schedules) made between the Governments of the United Kingdom and of the Federal Republic of Germany and modifies the National Insurance Acts, 1946 to 1960, in their application to persons affected by the Convention and Protocol (S.I. 1961 No. 1513).

Non-Participation

For new sets of regulations, see S.I. 1961, Nos. 1358 and 1378. The Report of the National Insurance Advisory Committee on the preliminary draft of the National Insurance (Non-Participation—Assurance of Equivalent Pension Benefits) Amendment Regulations, 1961 (S.I. 1961 No. 1378), has also been published (H.C. 266 of 1960–61).

National Insurance (Industrial Injuries)

Debate

On August 1, 1961, the House of Commons debated Industrial Injuries (645 H.C. Deb 1157–1225).

Decisions of the Commissioner

Death Benefit: method of treatment of claim where industrial accident previously disallowed on injury benefit claim: Decision No. R(I) 19/61.

Disease contracted before relevant accident. A claimant, who was suffering from diabetic vascular disease, injured his left foot; some four months later developed an ischaemic lesion, and some eleven months after this had his left leg amputated below the knee. A Medical Appeal Tribunal assessed the claimant's overall disabilities at 60 per cent. from which they offset 30 per cent. for the diabetic vascular disease. *Held* by a Tribunal of Commissioners that as a matter of law it was open to the Medical Appeal Tribunal to decide that diabetic vascular disease constituted a disability; that the percentage of the overall assessment of disablement to be offset on account of that disease was a question of fact and that both section 12 (2) (*b*) (i) of the 1946 Act and regulation 2 (3) (*b*) of the Benefit Regulations, 1948, authorised an offset to be made in the circumstances, with the result that the decision of the Medical Appeal Tribunal was not erroneous in point of law. Power to modify the general principles of assessment laid down in section 12 (2) of the Act by regulations considered: Decision No. R(I) 41/60.

Disfigurement. A Tribunal of Commissioners *held* that regulation 2 (5) of the Benefit Regulations, 1948 (the "paired organs" provision), is not limited in its application to disabilities which cause an actual loss of physical or mental faculty, but also applies to disfigurement unaccompanied by any actual loss of physical faculty: Decision No. R(I) 39/60.

Greater disabilities. A Tribunal of Commissioners *held* that while the assessment of the loss of faculty resulting from an industrial accident may be increased where that accident is made more disabling than it otherwise would have been as a result of a previous industrial accident, paragraphs (3) and (4) of regulation 2 of the Benefit Regulations, 1948, do not authorise the assessment of the loss of faculty resulting from an industrial accident to be increased on the ground that a subsequent industrial accident, not directly attributable to the first accident, has made the first accident more disabling than it would otherwise have been, since it is the second accident that is the effective cause of any greater disabilities: Decision No. R(I) 40/60.

Late claim—misreading of official information: Decision No. R(I) 25/61.

Loss of Faculty. Under section 12 (1) of the Industrial Injuries Act, 1946, as amended by section 3 (1) of the Industrial Injuries Act, 1953, if the disablement resulting from an industrial accident does not amount to 1 per cent. the accident is to be deemed not to have resulted in a loss of faculty. The Commissioner points out that, where appropriate, it is desirable that the medical authorities should make it clear whether they have concluded that there is *no* loss of faculty or whether they have concluded that there *is* a loss of faculty, but that the resulting disablement does not amount to 1 per cent.: Decision No. R(I) 6/61.

Medical Appeal Tribunals—discretion of Tribunals and the Commissioner to refuse leave to appeal if point of law raised of no substance: Decision No. R(I) 3/61.

Medical Appeal Tribunal decisions. In giving their decision upholding the decision of a medical board which had rejected an application by the claimant for a review under section 40 (2) of the Industrial Injuries Act on the ground of unforeseen aggravation of the results of the relevant injury, a Medical Appeal Tribunal simply stated "We agree with the Board." *Held*, that the decision of the Medical Appeal Tribunal was a nullity because it did not, in the circumstances of the case, comply with the requirements of regulation 13 (1) of the Determination of Claims and Questions Regulations that a Tribunal shall include in their decision a statement of reasons for their decision, including their findings on all questions of fact material to their decision. The Commissioners discuss the requirement of regulation 13 (1) in the light of the jurisdiction and functions of Medical Appeal Tribunals and point out, *inter alia*, that when a claimant has been physically examined by a Medical Appeal Tribunal, this should be stated in the record: Decision No. R(I) 18/61.

"Out of and in the course of employment"—fall on employer's premises after taking meal in canteen: Decision No. R(I) 14/61.

"Out of and in the course of employment"—accident to bus driver whilst returning to bus after taking tea: Decision No. R(I) 20/61.

"Out of and in the course of employment"—incapacity due to vaccination reaction: Decision No. R(I) 15/61.

"Paired organs." A claimant whose left index finger had been amputated as a result of an accident in respect of which he was not insured under the Industrial Injuries Acts subsequently injured his left middle finger in an industrial accident. In assessing the relevant loss of faculty a Medical Appeal Tribunal held that Regulation 2(5) of the Benefit Regulations, 1948, did not apply as even if fingers were "organs" the index and middle finger were not "similar" organs. The Tribunal granted the claimant leave to appeal to the Commissioner. *Held*, that Regulation 2(5) did not apply since whether or not fingers were "organs" or "similar" the fingers of one hand were not "one of two" similar organs within the meaning of the Regulation: Decision No. R(I) 1/61.

Post-war credits. Sixty-year-old claimant, who had war pension for 1914–18 war wounds and who had been paid disablement gratuities for industrial accidents in 1950, 1951 and 1953, had been in receipt of a 30 per cent pension on account of pneumoconiosis from 9.11.55. Since 5.7.56 he had been continuously in receipt of sickness benefit. He claimed repayment of his post-war credits on the ground that he would have been in receipt of unemployability supplement but for the fact that, being in receipt of sickness benefit, he had not claimed the supplement. *Held*, that because unemployability supplement is an increase of disablement *pension* the claimant could not rely directly upon the industrial accidents of 1950, 1951 and 1953. Nevertheless he had established that pneumoconiosis had turned him from a man who was capable of working to a man who was, having regard to his age, education, experience, state of health and other personal factors, likely to be permanently incapable of work, and his claim succeeded. Principles discussed in R(I) 26/52 in relation to Section 14 of the Act held to apply to Section 13. C.I. 99/49 (reported) and R(I) 34/54 considered: Decision No. R(I) 10/61.

Special Hardship Allowance—disregard of work in regular occupation: Decision No. R(I) 13/61.

Special Hardship Allowance—suitable alternative employment: Decision No. R(I) 22/61.

See also NATIONAL INSURANCE (above, p. 415).

NATIONALISED INDUSTRIES

Airways

Guarantees. Statements have been issued by the Treasury on loans proposed to be raised by B.E.A. (H.C. 273 of 1960–61) and B.O.A.C. (H.C. 274 of 1960–61).

Reports and accounts have been published for 1960–61 of B.E.A. (H.C. 257 of 1960–61) and B.O.A.C. (H.C. 258 of 1960–61).

Atomic Energy

Report. The 7th Annual Report of the United Kingdom Atomic Energy Authority 1960–61, has been published (H.C. 229 of 1960–61).

Coal

Reports. The Annual Reports of the Industrial Coal Consumers' Council and the Domestic Coal Consumers' Council, 1960–61, have been published (H.C. 249 of 1960–61).

Electricity

Guarantees. Statements have been issued by the Treasury on loans proposed to be raised by the Electricity Council (H.C. 275 of 1960–61), the North of Scotland Hydro-Electric Board (H.C. 277 of 1960–61) and the South of Scotland Electricity Board (H.C. 278 of 1960–61).

Report and accounts of the Area Boards, the Electricity Council and the Central Electricity Generating Board for 1960–61 have been published (H.C. 292–305 of 1960–61) with the report of the Minister of Power (H.C. 306 of 1960–61).

Gas

Guarantee. The Treasury has issued a statement of guarantee on loans to be raised by the Gas Council (H.C. 276 of 1960–61).

Select Committee on Nationalised Industries

The Report and Proceedings of the Select Committee on the Gas Industry, have been published (H.C. 280, 280–I of 1960–61).

Transport

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the British Transport Commission (H.C. 279 of 1960–61).

Parliament

Election

Wedgwood Benn Case. An Election Court is entitled to find that a person has succeeded to a peerage. A person succeeding to the United Kingdom peerage is thereby disqualified from sitting in the House of Commons, whether or not a writ of summons has been issued by the Crown. Such disqualification derives from status, the attributes and disabilities of which the successor to an hereditary peerage is unable to divest himself, for it would be wholly inconsistent with the hereditary principle governing the House of Lords if such a successor could choose the House in which he wished to sit. Where votes have been given by persons knowing the facts which give rise to disqualification, such votes are void, even if the voters do not know the legal consequences of those facts.

A.B. was the eldest surviving son of a peer of the United Kingdom, raised to the peerage by letters patent. After his father's death, A.B. did not apply for, or receive, a writ of summons, and stood as a candidate at a parliamentary by-election. His opponent informed all the electors that A.B. was disqualified as a peer, but A.B. secured a majority and was returned. On a petition by a voter and the defeated candidate, *held* that the votes for A.B. were void, and that the defeated candidate was duly elected: *Re* Parliamentary Election for Bristol South East [1961] 3 W.L.R. 577; [1961] 3 All E.R. 354, Election Court.

On July 31, 1961, the Speaker informed the House of Commons that he had that day received the Certificate of the judges appointed to try the Election Petition in the Bristol South-East constituency (645 H.C. Deb. 942–946).

Estimates Committee (House of Commons)

Reports. The Select Committee has published its Fourth Report (Variations in Estimates) (H.C. 232 of 1960–61), its Fifth Report (London's Airports) (H.C. 233 of 1960–61), its Sixth Report (Ministry of Agriculture, Fisheries and Food) (H.C. 241 of 1960–61), its Seventh Report (Inland Revenue) (H.C. 245 of 1960–61), and its Eighth Report (School Building) (H.C. 284 of 1960–61).

The Committee has also published its Tenth Special Report (House of Commons Library: Observations from Mr. Speaker's Advisory Committee) (H.C. 246 of 1960–61), and its Eleventh Special Report (Variations in Estimates: Observations of the Treasury) (H.C. 285 of 1960–61).

House of Lords

Offices. The Fourth Report from the Select Committee has been published (H.L. (138) of 1960–61).

Procedure. The First Report from the Select Committee has been published (H.L. (129) of 1960–61).

Privilege

Mr. Kenneth Kaunda. On July 6, 1961, Mr. G. M. Thomson submitted that confiscation of documents of Mr. Kenneth Kaunda, the Northern Rhodesian African leader, and a British-protected person, by immigration officials in Salisbury, Southern Rhodesia, involved a breach of the privilege of the House of Commons. The submission was made on the ground that among the documents confiscated was a letter written by Mr. Thomson to Mr. Kaunda, relating to some questions addressed to Ministers in the House. On July 7, 1961, the Speaker ruled that the complaint did not disclose a prima facie breach of privilege (643, H.C. Deb. 1676–1677, 1875).

Public Accounts Committee (House of Commons)

Reports. The Committee has published its Third Report (H.C. 252 of 1960–61). The Committee has also published its Special Report and First, Second and Third Reports together with Proceedings of the Committee (H.C. 19–I, 103–I, 220–I, 252–I of 1960–61).

Statutes

Royal Assent. The Public Authorities (Allowances) Act, 1961 (above, p. 403), the Consumer Protection Act, 1961 (above, p. 404), and the Sheriffs' Pensions (Scotland) Act, 1961 (above, p. 412), received the Royal Assent on July 19, 1961. The Land Compensation Act, 1961 (below, p. 423), received the Royal Assent on July 22, 1961. The Crown Estate Act, 1961 (above, p. 398), the Rating and Valuation Act, 1961 (above, p. 406), and the Rivers (Prevention of Pollution) Act, 1961 (above, p. 411), received the Royal Assent on July 27, 1961. The Highways (Miscellaneous Provisions) Act, 1961 (above, p. 401), and the Public Health Act, 1961 (above, p. 409), received the Royal Assent on August 3, 1961.

Public Authorities

British Phosphate Commission

Report and accounts for 1959–60 have been published (Cmnd. 1441).

Iron and Steel Holding and Realisation Agency

A Treasury Minute has been published, dated June 29, 1961, concerning a proposal by the Agency to sell its holding of securities in Barrow Steel Works Limited (Cmnd. 1436).

New Terms

Commission. On July 25, 1961, the House of Commons rejected a motion to the effect that the Commission for the New Towns (Appointed Day) Order, 1961 (S.I. 1961 No. 1162) ([1961] P.L. 310), be annulled (645 H.C. Deb. 349–384).

The Minister of Housing and Local Government has made the first appointments to the Commission for the New Towns, which came into being on October 1, and which will assume responsibility for the assets and properties of the New Towns as and when each reaches the stage when the main development is substantially completed. As foreshadowed in a statement in August, the Minister has appointed Sir Duncan Anderson as Chairman of the Commission and General Sir Nevil Brownjohn and Mr. Henry Wells as members. He has also appointed Mr. J. D. Russell, a member of a firm of City accountants, as a member of the Commission.

Reports have been published by the Cumbernauld, East Kilbride, and Glenrothes Development Corporations, 1960–61 (H.C. 272 of 1960–61).

The report of the Ministry of Housing and Local Government for 1960 (Cmnd. 1435) reviews the twelve New Towns of England and Wales and their achievements and experience over the past ten years. This continues the practice of the last four annual reports of the Ministry when one aspect of the Ministry's work has been chosen for special review.

Public Works Loan Board

Report for 1960–61 has been published (H.M.S.O. 63–36–0–61).

Sugar Board

Report and accounts for 1960–61 have been published (H.C. 283 of 1960–61).

Scotland

See Courts (above, p. 398), Education (above, p. 399), Housing (above, p. 403), Local Government (above, p. 403), National Health Service (above, p. 414), Town and Country Planning (below, this page), and Tribunals and Judicial Functions of Ministers (below, p. 425).

Subordinate Legislation

Parliamentary proceedings

Select Committee on Statutory Instruments (*House of Commons*). On July 4, 11, 18, 26 and 31, 1961, the Committee considered 21, 23, 18, 2, and 20 Instruments respectively and resolved that it was unnecessary to draw the special attention of the House to them. Only July 18, 1961, the Committee requested the President of the Board of Trade to furnish the Committee with a memorandum explaining the Draft Insurance Contracts (War Settlement) (Germany) Order, 1961 (H.C. 5–XVIII, 5–XIX, 5–XX, 5–XXI, 5–XXII of 1960–61).

Special Orders Committee (*House of Lords*). In the Eleventh, Twelfth, and Thirteenth Reports the Committee examined 18 Instruments. The Committee found that three Instruments were not founded on precedent and that one Instrument, the White Fish Subsidy (United Kingdom) Scheme, 1961, required the special attention of the House owing to the size of the subsidy proposed, but that no further special enquiries were necessary before the House decided whether to agree them (H.L. (109) (124) (133) of 1960–61).

Town and Country Planning

Atomic Energy Establishments

The Town and Country Planning (Atomic Energy Establishments Special Development) Order, 1961, amends the Town and Country Planning (Atomic Energy Establishments Special Development) Order, 1954 (as amended), by including land of the Atomic Energy Authority at Orfordness in Part I of the Schedule and deleting the entry relating thereto from Part II. This is because the land of the Authority at Orfordness (now a larger area than was referred to in that entry) has been constituted a prohibited place by virtue of the Official Secrets (Prohibited Places) Order, 1960 (S.I. 1960 No. 1348). (S.I. 1961 No. 1295.)

Building Preservation Order

In deciding whether to confirm a building preservation order on the ground that the building in question is of special architectural or historic interest within section 29 (1) of the Town and Country Planning Act, 1947, the Minister is entitled to consider the building in relation to its surroundings.

Per Megaw J. In stating his reasons as required by section 12 of the Tribunals and Inquiries Act, 1958, the Minister should do so clearly, making plain the principles on which his decision is based, especially if they were questioned by the appellant; for the onus is on the appellant to establish an error of principle, and difficulty of interpretation or obscurity of the stated reasons may effectively conceal or disguise an error of principle.

The Minister confirmed a building preservation order on the ground that it was of special architectural or historical interest as forming part of a square which was as a whole of such interest. *Held*, that he had not erred in principle and so his decision could not be quashed: EARL OF IVEAGH *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT [1961] 3 W.L.R. 708; [1961] 3 All E.R. 98, Megaw J.

Compensation

The Land Compensation Act, 1961 (9 & 10 Eliz. 2, c. 33), received the Royal Assent on June 22, 1961.

The Act repeals and re-enacts in consolidated form the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, and certain subsequent enactments relating to the assessment of compensation in respect of compulsory acquisition of interests in land; to the withdrawal of notices to treat; and to the payment of additional compensation and allowances in connection with such acquisitions or with certain purchases by agreement of interests in land. Some improvements and minor corrections have been made to facilitate the consolidation.

The Ministry of Housing and Local Government has issued a Circular to local authorities informing them that it came into operation on August 1, 1961. The Circular draws attention to section 40, a comprehensive saving provision which secures continuity by providing that any enactment or document referring to an enactment repealed by this Act shall be construed as referring to the corresponding enactment of this Act. The existing Regulations issued under the consolidated Acts and the forms prescribed will be brought up to date as and when the opportunity arises (Circular No. 34/61).

The Acquisition of Land (Rate of Interest after Entry) Regulations, 1961, increase from 6½ per cent. to 7½ per cent. per annum the rate of interest payable where entry is made, before payment of compensation, on land in England and Wales which is being purchased compulsorily. These Regulations revoke the Acquisition of Land (Rate of Interest on Entry) Regulations, 1960, which were made under section 57 (2) of the Town and Country Planning Act, 1947. Following the repeal and replacement of that section by section 32 of the Land Compensation Act, 1961, the 1960 Regulations continued in force under section 40 (5) of the Land Compensation Act, 1961. The Acquisition of Land (Rate of Interest after Entry) Regulations, 1961, are made under section 32 (1) of the 1961 Act (S.I. 1961 No. 1652).

The Acquisition of Land (Rate of Interest after Entry) (Scotland) Regulations, 1961, increase from 6½ per cent. to 7½ per cent. per annum the rate of interest payable where entry is made, before payment of compensation, on land in Scotland which is being purchased compulsorily, and revoke the Acquisition of Land (Rate of Interest on Entry) (Scotland) Regulations, 1960 (S.I. 1961 No. 1653).

Compulsory Purchase

Certificate of appropriate development. The essential matter of a certificate of appropriate development issued by a local planning authority under section 5 of the Town and Country Planning Act, 1959, is the conclusion. Therefore, if the Minister agrees with that conclusion he is entitled to confirm it leaving in the original reasons given by the authority, even though he is disagreeing with them, provided that he shows in the letter giving his reasons for decision

what the reasons are. Further, even though the reasons given by the local authority are inconsistent with the facts, nevertheless, the interests of the applicant are not prejudiced so as to entitle the court to quash the Minister's decision, because the reasons given in the certificate are irrelevant for any purpose for which the certificate is going to be used; it is not the certificate which falls to be quashed under section 31 of the 1959 Act but the action of the Minister.

The applicant, whose land was being compulsorily acquired for school playing fields, applied to the local planning authority for a certificate of appropriate alternative development. The authority issued a certificate stating that planning permission could not reasonably have been expected to be granted for any development other than that for which the land was being acquired, and giving reasons which contained inaccuracies of fact. On appeal to the Minister neither he nor the inspector accepted the authority's reasons, but he confirmed the certificate, giving his own reasons for doing so, "in the terms of the document annexed." The annexed document included a copy of the original certificate containing the authority's reasons. The applicant applied to the court to quash the Minister's decision. *Held*, the application should be dismissed: PARRISH *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT (1961) L.G.R. 411, Megaw J.

Oxford Traffic Inquiry

On July 18, 1961, the Ministry of Housing and Local Government, in a written answer, stated that he saw no possibility of announcing his decision on the Oxford roads inquiry before the Recess (644 H.C. Deb. 114; see also 645 H.C. Deb. 202–203).

Planning Appeals

Scotland. On July 19, 1961, the Secretary of State for Scotland, in a written answer, gave a table showing how appeals lodged under the Town and Country Planning Acts in the ten-year period 1950–61 were disposed of (644 H.C. Deb. 141–142).

Planning Permission

Refusal. A notice of refusal of planning permission given outside the periods allowed by article 5 (8) of the Town and Country Planning General Development Order, 1950, is void and of no effect.

The plaintiff used certain land for the display of motor-cars without the necessary planning permission and an enforcement notice was served. He applied in 1957 for permission to continue the user and nothing more was done until, in 1960, the local planning authority gave him a notice purporting to refuse the application. The plaintiff sought an injunction to restrain the planning authority from acting on the enforcement notice (which section 23 (3) of the Town and Country Planning Act, 1947, suspended until the application was determined) and a declaration that the enforcement notice and the notice refusing permission were of no effect. *Held*, that the declarations should be made: EDWICK *v.* SUNBURY-ON-THAMES U.D.C. [1961] 3 W.L.R. 553; [1961] 3 All E.R. 10, Salmon J.

Thurrock. On July 26, 1961, on the motion for the adjournment, the House of Commons debated the Minister's decision over an application for planning permission to fell trees and dig for gravel and sand in Thurrock, Essex (645 H.C. Deb. 563–574).

Use Classes

1. Use Class 5 under Town and Country Planning (Use Classes) Order, 1950, deals with a genus of uses which cause atmospheric pollution. 2. "Recovering of metal from scrap" in class 5 (iv) means the recovering of metal other than scrap metal from scrap.

The applicant company had an existing right to use certain land for processes within Class 5 other than para. (iv) of that class. It applied for an order that no permission was needed for it to use the land for recovering scrap metal, the separation of different scrap metals and of scrap metal from non-metallic substances, the grading of scrap metal and its burning or shearing or compression into briquettes. A small amount of scrap would also be recovered as metal by brushing or cleaning. *Held*, that the proposed use did not fall within Class 5 because (save for the small amount of metal to be recovered, which was not enough to bring article 3 (3) of the order into operation) it was not the recovery of metal from scrap within Class 5 (iv), but the recovery of scrap metal; planning permission was therefore required: GEORGE COHEN 600 GROUP *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT [1961] 1 W.L.R. 944; [1961] 2 All E.R. 682, D.C.

See also LOCAL GOVERNMENT (above, p. 403).

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

Agricultural Land Tribunals

The Agricultural Land Tribunals (Amendment) Order, 1961, prescribes the procedure on applications to Agricultural Land Tribunals under sections 45 and 46 of the Land Drainage Act, 1961 (which enable orders to be made for the cleansing of ditches and the carrying out of drainage work in connection with ditches). Under Rule 18A the tribunal is required to obtain a report from the Minister of Agriculture, Fisheries and Food on the matters to which the application relates and may for this purpose authorise an officer of the Minister to enter and inspect any land for the purpose of making his report, on which the officer is liable to cross-examination at the hearing of the application. Rule 18C enables a formal hearing to be dispensed with if all the parties (except anyone who has failed to reply or who has withdrawn his reply) agree to an order being made in the terms of the recommendations contained in the report.

Rule 4 enables recorded delivery post to be used in all proceedings before Agricultural Land Tribunals (S.I. 1961 No. 1755).

Council on Tribunals

The Second Report of the Council (Chairman: Viscount Tenby, T.D.) for 1960 has been published.

The council is currently having to devote as much of its attention to statutory inquiries, which form part of the process by which a Minister exercises his discretion, as to tribunals, which, generally speaking, exercise an independent jurisdiction. Although it is still occupied with rules of procedure, procedural questions referred to it by the Lord Chancellor or the Secretary of State for Scotland, and visits to tribunals, these important features of its work are already outweighed by the consideration of comments and complaints by members of the public.

Pointing out that its work was as of much significance to the general public as to lawyers and administrators, the council recorded that during 1960—the year under review—no less than 122,000 cases, most of them involving some sort of dispute between a private individual and a Government department, were decided by administrative tribunals under its supervision (and that of its Scottish Committee), and that about 5,700 statutory inquiries—mostly the results of appeals against planning orders and objections to compulsory purchase orders —also came within its scope. Although the council had no say in the issues to be decided and no power to overrule decisions that had been made, it was expected to "act as a watchdog for the ordinary citizen and to see that he gets fair play" over this whole field.

The council pointed out that there were some 2,000 administrative tribunals in existence at the end of 1960 and their number was increasing all the time. Originally envisaged as a compromise between the needs of efficient administration and the demands of justice, the tribunals had been developed piecemeal

in many different statutes and they now represented a "supplementary legal system of enormous extent." It was the council's main task to see that this system did not "get out of hand"; when new tribunals were proposed, the council was likely to have views on the matter, and its advice might be useful in remedying the lack of co-ordination that had been the subject of criticism in the past.

During the year under review, the council was consulted about seven sets of procedural rules or amendments to existing rules of procedure, and in each case, with the full co-operation of the Government department concerned, it had been able to see that improvements were made.

On the other hand, the council had not felt able to endorse the two recommendations of the Franks Committee that were among the items of general procedural interest referred to it for consideration. It thought that there were "substantial objections" to the proposal that absolute privilege should be conferred on witnesses before tribunals—or at any rate on those giving evidence on oath. In the opinion of the council, the existing defence of qualified privilege was sufficient protection in the proceedings of tribunals generally; any extension of absolute privilege beyond those tribunals where it already applied might tempt people to make malicious statements—tribunals having, on the whole, less power to control witnesses than had judges in ordinary courts of law. On the question of the issue of subpoenas to compel witnesses to give evidence or produce documents, the council could find nothing to prevent anyone obtaining a Crown Office subpoena in proceedings before any tribunal. It did not consider it proper that this power should be handed over to the tribunals themselves, and therefore concluded that no change in procedure was necessary. It suggested, however, that efforts should be made to see that the existing facilities were more widely known. The Scottish Committee of the Council came to similar conclusions on procedure in Scotland.

The council emphasised in its report that its powers in regard to statutory inquiries were limited to those inquiries held by a Minister in pursuance of a statutory duty, *i.e.* where the hearing was an obligatory part of the procedure. The council had no powers in respect of discretionary inquiries; nor was it required to exercise "continuous supervision" over inquiries of any kind. To keep its members informed, the council paid visits to inquiries (18 in 1960) in different parts of the country; it also studied press comment, complaints from the public (21 in 1960), and reports from practitioners and professional organisations.

The council believed that "the dilemma that underlies the acute problems" of statutory inquiries arose from the fact that although a hearing may be modelled on judicial procedure, "it cannot lead to an equally objective decision." When Parliament set up a tribunal to decide cases, its members had no concern with ministerial policy, except in so far as that policy was contained in the rules which the tribunal had to apply. But a Minister, when he decided a case that had been the subject of an inquiry, was "committed to a policy which he has been charged by Parliament to carry out."

Some of the problems connected with statutory inquiries might become less urgent when the council had had a chance to study the code of procedure for statutory inquiries, which would be submitted to it when the Government had finished its consultations with the professional organisations. It was likely, however, that the subject would "continue to present us with difficult points and also to arouse public interest and sharp controversy."

On July 12, 1961, the House of Lords debated the scope and powers of the council. Some members showed concern about the limited authority of the council in regard to statutory inquiries. Lord Lucas of Chilworth, who opened the debate, said that any code of procedure "must give the Council on Tribunals complete authority to see that the procedure before the inquiry, during the inquiry and after the inquiry, is so modelled as to safeguard the rights of the citizen at all stages." In his view, the council's powers of

investigation must be increased. Lord Denning supported this opinion, pointing out that there were a large number of decisions still taken by departments and Ministers which ought to be the subject of tribunals and are not, and that the council ought to be authorised to consider whether some of these decisions ought not to be put before the tribunals. He would like to see the council having power to keep inquiries constantly under review. In reply to the debate, the Lord Chancellor said that he had various ideas in mind—one of which was to enlarge the council while keeping it of the same kind. He thought its value lay in the fact that the public had the assurance that the activities of professional administrators and members of tribunals could be scrutinised by a body of persons with no axe to grind, who brought to their work a wide experience. The council would be asked for its views on the proposed rules of procedure and would also be asked to examine the question of the awarding of costs in connection with tribunals and inquiries (233 H.L. Deb. 153–220; Commonwealth Survey, C.O.I., August 15, 1961).

Disciplinary Bodies

Council for Professions Supplementary to Medicine. The Professions Supplementary to Medicine Act, 1960 (Commencement No. 1), Order, 1961, brings into operation, as from July 1, 1961, certain provisions of the Professions Supplementary to Medicine Act, 1960, and in particular the provisions with respect to the establishment and constitution of a Council for Professions Supplementary to Medicine and of Boards for the professions of chiropodists, dietitians, medical laboratory technicians, occupational therapists, physiotherapists, radiographers and remedial gymnasts (S.I. 1960 No. 1201).

General Nursing Council. The General Nursing Council Disciplinary Committee (Legal Assessor) (Scotland) Rules, 1961, regulate the functions of legal assessors appointed under section 10 of the Nurses (Amendment) Act, 1961, to advise the General Nursing Council for Scotland or any committee of it on questions of law arising in disciplinary proceedings before them (S.I. 1961 No. 1331).

The Nurses Rules, Approval Instrument, 1961, has been made. The Rules approved by this Instrument are a consolidation of the Nurses Rules, 1951, as amended, with further amendments due in part to the coming into operation of the Nurses (Amendment) Act, 1961. The amendments include in particular the following:—

(1) the constitution of an Investigating Committee in place of the Disciplinary and Penal Cases Committee of the Council (Rule 59 (1));

(2) the constitution of a Disciplinary Committee to exercise the Council's power of removing the name of a nurse from the Register or of restoring a name thereto (Rule 59 (1));

(3) a more elaborate code of procedure concerning removal from and restoration to the Register (Rules 26 to 48) (S.I. 1961 No. 1520).

The General Nursing Council Disciplinary Proceedings (Legal Assessor) Rules, 1961, regulate the functions of the Legal Assessor appointed under section 10 of the Nurses (Amendment) Act, 1961, to advise Committees of the General Nursing Council on questions of law arising in disciplinary cases before them (S.I. 1961 No. 1597).

General Optical Council. The General Optical Council Disciplinary Committee (Legal Assessor) Rules, 1961, regulate the functions of the Legal Assessor appointed under section 16 of the Opticians Act, 1958, to advise the Disciplinary Committee of the General Optical Council on questions of law arising in disciplinary cases before them (S.I. 1961 No. 1239).

Trade Union. 1. Natural justice requires that the disciplinary tribunal of a trade union cannot impose any punishment on a charge which the accused has not had a chance of answering. 2. The accused's right to enforce that

rule in the courts is not lost by an appeal to a higher tribunal of the union whose decision its rules provide is to be "final and binding."

A member of a union was charged before its general council with certain breaches of its rules for which the maximum penalty was a small fine. The hearing was adjourned and he did not attend the adjourned hearing, at which the council purported to expel him from the union for a breach of a rule which he had not previously been charged with breaking. He appealed to the union's annual conference of delegates, whose decisions its rules provided should be "final and binding" but lost that appeal. He then sued for an order setting aside the decision of the general council. *Held*, that as the general council had not followed the rules of natural justice its decision must be declared invalid and the accused man's right to sue for such an order had not been forfeited by his appeal to the annual conference: ANNAMUNTHODO *v.* OILFIELD WORKERS' TRADE UNION [1961] 3 W.L.R. 650.

Licensing Authorities

The Annual Reports of the Licensing Authorities, 1950–60, covering the period 1959–60, have been published (H.M.S.O. 55–178–0–60).

National Health Service Tribunal

A report by the chairman, Sir Reginald Sharpe, Q.C., on the work of the National Health Service Tribunal for England and Wales during the four years ending on July 4, 1961, shows that out of twenty-one cases dealt with during that period sixteen were completed.

Ten were representations for the removal of a practitioner's name from the Executive Council list. In five of these the Tribunal directed that the name be removed, on the grounds that continued inclusion would be prejudicial to the efficiency of the National Health Service. Those concerned included: one doctor, two dentists and two persons providing pharmaceutical services. In two other cases the respondent gave an undertaking not to practise under the Health Service. Three other cases were dismissed or not proceeded with.

There was only one appeal against the decision of the Tribunal (not heard by July 4, 1961) during this period.

Six applications, four successful, were heard for reinstatement on the list or release from undertakings (Ministry of Health E.C.L. 87/61).

Scottish Land Court

The Report by the Scottish Land Court as to its proceedings in 1960 has been published (Cmnd. 1382).

COMMONWEALTH AND DEPENDENT TERRITORIES

GENERAL

Colonial Development

The Return of Schemes made and of Loans Approved under the Colonial Development and Welfare Act in the period 1960–61 has been published (H.C. 240 of 1960–61).

Diplomatic Immunities

The Commonwealth Countries and Republic of Ireland (Immunities) Order, 1961, consolidates the Orders specified in Article 4, with additions to the schedule relating to Nigeria. It confers on persons for the time being holding any of the offices or classes of offices described in the Schedule to the Order

the like immunity from suit and legal process and the like inviolability of official archives as are accorded to consular officers of a foreign sovereign power, and restricts powers of entry into the official premises of such persons (S.I. 1961 No. 1194).

European Economic Community

A White Paper has been published on talks between British Ministers and other Commonwealth Governments on Britain's relations with the European Economic Community (Cmnd. 1449).

Legal Education

On August 1, 1961, the Lord Chancellor stated that the Governors of the African colonial territories have given urgent consideration to the report of Lord Denning's Committee on Legal Education for Students from Africa (Cmnd. 1255; [1961] P.L. 203).

Some progress has been made and in East Africa it is hoped that a Law Faculty will open in Dar-es-Salaam this October (234 H.L. Deb. 47–49).

Aden

Constitutional advance

Talks took place in July 1961 in London between the Secretary of State for the Colonies and delegations from the Federation of Arab Amirates of the South and from the Aden Government. Valuable progress was made in a preliminary examination of problems of joint concern to the Federation and the Colony. It was agreed that further discussions, leading to the establishment of a much closer link between the Federation and the Colony and to further constitutional advance in the Colony, should begin under the Governor's chairmanship in Aden. (See 644 H.C. Deb. 576–577.)

British Guiana

Constitution

The British Guiana (Constitution) Order in Council, 1961, has been made.

The purpose of this Order is to provide a new Constitution for British Guiana. It contains provision with respect to fundamental rights, the office of Governor, a Council of Ministers, the Legislature (which includes two chambers called the Senate and the Legislative Assembly), the Judiciary, the Public Service and Finance (S.I. 1961 No. 1188).

The British Guiana Royal Instructions, 1961, dated June 26, 1961, revoke the British Guiana Royal Instructions, 1953.

Guarantee

A statement has been issued by the Treasury on loans proposed to be made to the Colony of British Guiana by the International Bank for Reconstruction and Development (H.C. 264 of 1960–61).

Cameroons

Southern Cameroons

The Southern Cameroons (Constitution) (Amendment No. 2) Order in Council, 1961, amends the Southern Cameroons (Constitution) Order in Council, 1960, to enable the Commissioner of the Southern Cameroons to legislate by proclamation with respect to police, and makes consequential amendments to the provisions relating to the control of police in the Southern Cameroons (S.I. 1961 No. 1504).

On August 1, 1961, the House of Commons debated the Southern Cameroons (645 H.C. Deb. 1331–1351).

Cyprus

Diplomatic Immunities

The Diplomatic Immunities (Conferences) (Cyprus) Order, 1961, adds Cyprus to the countries included in the Diplomatic Immunities (Conferences with Commonwealth Countries and Republic of Ireland) Act, 1961, under which diplomatic immunity may be conferred on Commonwealth representatives, and their staffs, attending governmental conferences (S.I. 1961 No. 1508).

East Africa High Commission

Colonial Report

The Report for 1960 has been published by the Colonial Office (H.M.S.O. 58–331–0–60).

Future of the Commission

The Report of the London Discussions in June 1961, on the future of the East Africa High Commission Services has been published (Cmnd. 1433; see [1961] P.L. 317). (See also 643 H.C. Deb. 103–104—written answer of the Secretary of State for the Colonies.)

Fiji

Colonial Report

The Report for 1959 has been published by the Colonial Office (H.M.S.O. 58–1–15–59).

Gambia

Constitutional Conference

The Report of the Gambia Constitutional Conference has been published (Cmnd. 1469).

Agreement on the introduction of a new constitution for the Gambia, envisaging a high degree of internal self-government, was reached at the conference held at the Colonial Office in July under the chairmanship of the Secretary of State for the Colonies, and attended by a representative delegation from the Gambia. The talks followed a local conference held in Bathurst in May, the record of which was before the Secretary of State for consideration at the London talks, and agreement on various matters which had been left unsettled at Bathurst had been reached by the Gambian delegates before the London conference. A general election under the new constitution is to be held not later than May 1962, if this is administratively possible, and the new executive and legislative arrangements would come into force thereafter. The main points on which general agreement was reached are as follows.

The Executive Council should consist of the Governor as President, a Premier and not fewer than eight Ministers (including a Minister of Finance) drawn from the legislature, the House of Representatives. The Financial Secretary should attend meetings of the council as appropriate and the Attorney-General should normally attend in an advisory capacity. The Governor should appoint as Premier the elected member of the House of Representatives who is the leader of the party which commands the support of the majority of that House, or, if there is no such person, the elected member of the House who, in his judgment, is most likely to command the support of the majority. The Governor should retain his special responsibility for internal security, external affairs, defence and the public service. In other matters he should normally act in accordance with the advice of the Executive Council. The House of Representatives should consist of a Speaker elected by the House, 32 elected members (seven from the Colony and 25 from the Protectorate); the Attorney-General as a non-voting member; not more than two members nominated by the Governor after consultation with the Premier and without votes; and

four Chiefs elected by the Chiefs in Assembly. Elections should be by secret ballot under universal adult suffrage, except that, as the Chiefs are to have special representation, they should not vote in the ordinary constituency elections. The membership of the advisory Public Service Commission should be revised so that it consists of an unofficial chairman and five Gambian members who are not civil servants or actively engaged in politics. In reply to suggestions that a date for independence should be fixed now, Mr. Macleod said that, while he sympathised with the aspirations of the delegates on this, and accepted that independence in one form or another was the goal, this was a matter for consideration during the next stage after the new constitution had come into force.

After the constitutional talks, there was a general discussion on the financial and economic problems of the Gambia and delegates had an opportunity to express their views on the development needs of the territory. It was agreed that there should be financial talks in the autumn with representatives of the Gambia Government.

In his opening remarks at the London conference, the Colonial Secretary gave two reasons for contemplating further changes so soon after the introduction of the present constitution: the growth of political consciousness in the Gambia and the developments which have taken place in the surrounding countries of West Africa. He also said that the constitution of the Gambia could not be considered in isolation from the underlying economic realities, and on this point he quoted from the Governor's address to the House of Representatives on April 19:

"I believe that in looking ahead we must realistically consider our economic and political future as a whole. We must consider it against the background of what may be described as the accident of history which created the Gambia too small and too ill-endowed with natural resources to develop economically in isolation. The peculiar position of her boundaries has prevented the full use of her one great natural asset—the Gambia River—and has restricted the development of the port of Bathurst. Her small size has severely limited her prospects of being able to become fully self-supporting at a reasonable level of services. There are, then, many reasons, both political and economic, which suggest that consideration should be given to the Gambia's relations with our neighbours with a view to seeing whether the obstacles to economic development resulting from separation can be overcome. I know that we are all conscious of many differences in the habits and traditions of the people of the Gambia and Senegal. We cannot ignore—nor would we wish to ignore—the long association between Britain and the Gambia and the strong ties which that association has created. The British Government has no wish to sever this historic connection, but if, after further stages in our constitutional development, a fully representative Gambian Government is able to address itself to these problems with the solid backing of the Gambian people who have elected them, Her Majesty's Government would certainly not wish to oppose the development of a close association with our neighbours." (Commonwealth Survey, C.O.I., August 29, 1961.)

Jamaica

Colonial Report

The Report for 1958 has been published by the Colonial Office (H.M.S.O. 58–1–22–58).

Kenya

Constitutional Talks

At a meeting in London on June 28, 1961, between Ministers of the Kenya Government, representatives of the Kenya Opposition (K.A.N.U.) and United Kingdom Ministers, it was agreed that sufficient common ground existed

between the Kenya Government and the Opposition for constitutional discussions to be initiated by the Governor at an early date.

Release of Jomo Kenyatta

The dispatch from the Governor of Kenya to the Secretary of State for the Colonies on the release of Jomo Kenyatta has been published (Cmnd. 1459).

See also EAST AFRICA HIGH COMMISSION (above, p. 430).

KUWAIT

Relations with the United Kingdom

An Exchange of Notes regarding relations between the United Kingdom and the State of Kuwait has been published (Cmnd. 1409).

MALTA

Electoral Provisions

The Malta (Electoral Provisions) Order in Council, 1961, dated August 2, 1961, makes provision for the application of electoral laws.

MAURITIUS

Constitutional Talks

The following final communiqué was approved at the final Plenary Session of the Mauritius Constitutional Review Talks at the Colonial Office on July 7, 1961, with the Colonial Secretary in the chair:

1. At the invitation of the Secretary of State for the Colonies representatives of the Mauritius Labour Party, the Independent Forward Bloc, the Muslim Committee of Action, the Parti Mauricien and two independent members of the Mauritius Legislative Council met in London from June 26 to July 7 to exchange views on the present Constitution and to discuss the extent, the form and timing of any changes. Sir Colville Deverell, the Governor of Mauritius, and Professor S. A. de Smith, the Constitutional Commissioner, were present throughout the talks.
2. After an initial plenary meeting and separate and frank discussions with each of the groups the Secretary of State tabled proposals which were discussed at two plenary sessions. In the light of the comments made upon them by delegates, the proposals were further modified by the Secretary of State and discussed at further plenary sessions on July 5 and 6.
3. The proposals are based on the assumption that constitutional advance in Mauritius towards internal self-government is inevitable and desirable; that the extent and timing of any advance must take into account the heterogeneity of the population and include provisions for adequate safeguards for the liberties of individuals and the interests of the various communities. It is that and not any lack of talent or aptitude for government which conditions the pace of advance in Mauritius.
4. Two stages of advance are proposed. The first stage is to be brought into operation as soon as the necessary arrangements can be made. The second stage presents a broad basis of the constitution for adoption after the next general election and in the light of that election if, following an affirmative vote by the Legislative Council, they are recommended to the Secretary of State by the Chief Minister. On the assumption that the second stage is implemented after the next general election, it would be expected that during the period between the next two general elections or what has been called the second stage, if all goes well and if it seems generally desirable, Mauritius should be able to move towards full internal self-government.
5. It is not possible at this stage to suggest what should be the precise status of Mauritius after the attainment of full internal self-government. It is the

general wish that Mauritius should remain within the Commonwealth. Whether this should be achieved as an independent state, or in some form of special association either with the United Kingdom or with other independent Commonwealth countries, are matters which should be considered during the next few years in the light of constitutional progress generally.

6. The changes proposed are:

First Stage

(1) The Leader of the Majority Party in the Legislature would be given the title of Chief Minister.

(2) The Governor would consult the Chief Minister on such matters as the appointment and removal of Ministers, the allocation of portfolios and the summoning, proroguing, and dissolution of the Council. It would be understood that in general he would not be bound to accept the Chief Minister's advice but that he would act on the advice of the Chief Minister in the appointment or removal of Ministers belonging to the Chief Minister's party.

(3) An additional unofficial ministerial post would be created. The new Ministry would have responsibility for Posts and Telecommunications, The Central Office of Information and the Broadcasting Service.

(4) The Colonial Secretary would be re-styled "Chief Secretary."

Second Stage

(1) *Executive Council*

(a) The Council would be called the Council of Ministers.

(b) The Chief Minister would be given the title of Premier.

(c) The Premier would be appointed by the Governor in accordance with the conventions obtaining in the United Kingdom; that is to say, the Premier would be the person who, in the opinion of the Governor, was most likely to be able to command the support of the majority of members of the Legislature.

(d) The Council would not be a purely majority party government but as at present would include representatives of other parties or elements which accepted the invitation to join the Government and the principle of collective responsibility.

(e) In appointing Ministers from groups other than the Premier's Party, the Governor would act in his discretion but would consult with the Premier and such other persons as he deemed fit to consult.

(f) The Financial Secretary would cease to be a member of the Council.

(g) Provision would be made for the post of Attorney-General to be filled by an official or by an unofficial Minister. In the former case the holder would cease to be a member of the Council but would continue to be available to attend meetings as an Adviser. In the latter case it would be necessary to create a new official post of Director of Public Prosecutions who would be solely responsible in his discretion for the initiation, conduct and discontinuance of prosecutions and would in this respect be independent of the Attorney-General.

(h) The Chief Secretary would continue to be a member of the Council and would become in addition to his substantive appointment Minister for Home Affairs.

(i) An Unofficial Deputy Minister for Home Affairs would be appointed.

(2) *Legislative Council*

(a) The Council would be re-named the Legislative Assembly.

(b) The Assembly would contain 40 elected members. The maximum number of nominated members would be increased to 15. It is contemplated that two or three of these appointments should be held in reserve.

(c) The Speaker would be elected by the Legislative Assembly from among its members but this provision would only become effective on the retirement of the present Speaker.

(d) The Financial Secretary and (if the post were held by an official) the Attorney-General would cease to be members of the Legislative Assembly.

(e) The Governor in his discretion would summon, prorogue and dissolve the Assembly after consultation with the Premier.

(3) *The Public Service, Police Service and Judiciary*

(a) The Public Service and Police Service Commissions and the proposed Judicial and Legal Service Commission would remain advisory to the Governor. The Governor would however be required to consult the Premier in respect of certain appointments, *viz.* Permanent Secretary (or by whatever title the senior administrative officer in a Ministry is described) and heads of departments.

(b) The Chairman and members of the Commissions would continue to be appointed by the Governor in his discretion.

(c) The Membership and procedure of the Commissions, in the second stage, would so far as possible be conducive to the development of these bodies in such a way as to enable them to become fully executive.

(d) During the life of the Legislative Assembly following the next general election the Service Commissions would become executive. At this stage, while the Chairman and Members of the Commission would continue to be appointed by the Governor in his discretion, he would be required to consult the Premier in respect of these appointments.

(e) The appointment of the Chief Justice would remain as at present.

(4) *External Affairs, Defence and Internal Security*

(a) These matters would remain within the responsibility of the Governor who would however consult with the Premier about these matters.

(b) The operational control of the Police and Special Force would continue to be the responsibility of the Commissioner under the authority of the Governor.

(5) *Human Rights*

The Constitution would include provision for the safeguarding of human rights and fundamental freedoms and for the redress of infringements of these rights and freedoms in the courts.

7. The Independent Forward Bloc and the Parti Mauricien, for reasons which they gave in full to the conference, were unable to accept the Secretary of State's proposals.

8. The Mauritius Labour Party considered that the proposals did not provide the measure of advance which they were fully justified in claiming. They were, however, prepared to accept them, if reluctantly, as a compromise, on the recommendation of Her Majesty's Government, in the best interests of Mauritius.

9. The Muslim Committee of Action did not consider that the proposals adequately safeguarded the interests of the Muslim community. Reluctantly, however, and as a compromise, they too were prepared to accept them in the general interest of Mauritius as a whole.

10. The two independent members considered that it would not be wise in present circumstances to go beyond the proposals put forward by the Secretary of State. They recognised that some measure of advance was inevitable and as the electorate would be given an opportunity of expressing its views before the second and more important stage was introduced, they too accepted them.

11. The Secretary of State informed the Conference that while it was clear that unanimous agreement could not be reached, in his view a sufficient measure

of acceptance had been indicated to justify his recommending the adoption of his proposals.

12. Certain delegates proposed the creation of a "Council of State" or "high-powered tribunal." The functions and composition of such a body would, however, present problems of some complexity and would need careful study. The Secretary of State proposed to address a despatch to the Governor giving his considered views on this, after consultation with the Constitutional Commissioner. The Secretary of State would at the same time indicate the arrangements which could be made to ensure that the information and broadcasting services should continue to operate on a non-partisan basis.

13. It was agreed that consideration should be given at a later stage to the question whether a visit to Mauritius by the Constitutional Commissioner, Professor de Smith, would be valuable in examining in greater detail the broad conclusions of the Conference and considering particular aspects which had not come within its scope.

(See the Statement of the Colonial Secretary, in a written answer, on July 11, 1961: 644 H.C. Deb. 28–32.)

Rhodesia

Northern Rhodesia

Constitutional Change. On September 13, 1961, the Government issued a statement to the effect that it had had under consideration political reactions in Northern Rhodesia to the constitutional proposals announced by the Secretary of State for the Colonies on June 26. They have noted that opinion in the Territory appears in general to be ready to accept such major features of these proposals as the substantial increase in the number of Africans in the Legislature; the general size of the Legislature and its composition on the basis of an equal number of Upper and Lower Roll constituencies and a similar number of National constituencies, in which there should be an appeal to both races, together with a degree of racial reservation within these seats; the establishment of a House of Chiefs; and the general qualifications for the franchise. But other aspects of the proposals have encountered criticism from various quarters.

In accordance with their normal practice Her Majesty's Government would have been prepared, before finally implementing their proposals, to consider any reasonable representations about them which those concerned might wish to put forward. They cannot, however, ignore the recent outbreak of grave lawlessness in certain parts of Northern Rhodesia. This carries the risk of serious delay in the constitutional advancement of the Territory, which all are anxious to secure, since it is not possible in such circumstances for any Government to give consideration to constitutional issues. Their first task must be to ensure that law and order are maintained.

When, however, in the Governor's judgment, violence and disorder have ceased, H.M.G. will be ready to consider, on the basis of the White Papers and the Secretary of State's statement in the House of Commons on June 26, any representations within the area where divergences of view persist. H.M.G. would hope that such representations would disclose a prospect of general agreement. In any event, however, they will proceed, after considering them to take their own final decisions and to publish the necessary instruments to introduce the new Constitution and to prepare for a general election.

Nyasaland

The Nyasaland (Constitution) Order in Council, 1961, revokes the Orders set out in the First Schedule and makes new provision for Nyasaland with respect to the Governor, the Executive Council and the Legislative Council. It provides for the constituencies for which elected members of the Legislative Council are to be returned and for the qualifications of those members and of

the voters who will elect them. It also provides for the public service, and for the setting up of advisory Public Service and Police Service Commissions. It reconstitutes the High Court and provides for the jurisdiction of the High Court and subordinate courts. Finally, it contains certain miscellaneous and transitional provisions (S.I. 1961 No. 1189).

Sarawak

Colonial Report

The Report for 1960 has been published by the Colonial Office (H.M.S.O. 58–1–33–60).

Public Service Commission

The Sarawak (Public Service Commission) Order in Council, dated August 2, 1961, establishes a Public Service Commission, appointed by the Governor, to which the Governor will refer for advice any question relating to the appointment or termination of appointment of public officers.

Sierra Leone

International Rights and Obligations

An Exchange of Letters between the Government of the United Kingdom and the Government of Sierra Leone on Sierra Leone's International Rights and Obligations has been published (Cmnd. 1464).

Swaziland

Colonial Report

The Report for 1959 has been published by the Colonial Office (H.M.S.O. 58–1–42–59).

Tanganyika

Independence

On July 6, 1961, the Secretary of State for the Colonies announced that by an agreement between the United Kingdom and Tanganyika Governments, the date of Tanganyika's independence had been advanced from December 28 to December 9, 1961. Accordingly, the United Kingdom Government will propose to the General Assembly of the United Nations at its autumn session that the Tanganyika trusteeship agreement should be terminated at the earlier date (643 H.C. Deb. 1659–1660; 232 H.L. Deb. 1482–1483).

The Tanganyika (No. 2) Order in Council, 1961, revokes the Tanganyika (Public Service Commission) Orders in Council, 1960 and 1961, and amends the Tanganyika Order in Council, 1920, so as to establish a new Public Service Commission and a Police Service Commission and a Judicial Service Commission. Responsibility for the public service is vested in these Commissions but special provision is made for certain offices. This Order also inserts in the Order of 1920 certain provisions relating to finance (S.I. 1961 No. 1190).

The Tanganyika (Legislative Council) (Amendment No. 2) Order in Council, 1961, has been made.

The purpose of this Order is to make a further amendment to the Order of 1926 in consequence of the abolition of the office of Deputy Governor. The opportunity is also taken to correct a minor mistake in Clause XV of the Order of 1926 (S.I. 1961 No. 1191).

The Tanganyika Additional Instructions, dated June 26, 1961, amend the Tanganyika Royal Instructions, 1961.

Report to the United Nations

The Report by the Government to the General Assembly of the United Nations on Tanganyika under United Kingdom Administration has been published in two Parts (H.M.S.O. 58-349).

Tonga

Chief Commissioner for Tonga

The Tonga (Amendment) Order in Council, 1961, has been made.

The need for this Order arises from the Treaty of Friendship with Tonga dated August 26, 1958, ratified on May 25, 1959 (published as Cmnd. 606). The Order amends the Tonga Order in Council, 1952, by constituting the Governor of Fiji in his relation to Tonga the United Kingdom Chief Commissioner for Tonga. It also makes consequential and minor amendments (S.I. 1961 No. 1505).

The Tonga Royal Instructions, 1961, dated August 2, 1961, make consequential provisions following the Tonga (Amendment) Order in Council, 1961.

Uganda

Colonial Report

The Report for 1960 has been published by the Colonial Office (H.M.S.O. 58–1–47–60).

Constitutional Conference

The Uganda Constitutional Conference opened in London on September 18, 1961, with the Secretary of State for the Colonies in the chair. Opening the conference, the Colonial Secretary said he believed that the recommendations of the Uganda Relationships Commission (the Munster Commission) provided a basis upon which the Conference may be able to agree on a constitution to take Uganda to the last stage before final independence, that of internal self-government.

Deputy Governor

The Uganda (Amendment No. 2) Order in Council, 1961, amends the Uganda Order in Council, 1920, and constitutes the office of Deputy Governor for the Protectorate. A minor amendment is also made to the Uganda Order in Council, 1902 (S.I. 1961 No. 1193).

Additional Instructions, dated June 26, 1961, have been given to the Governor of the Uganda Protectorate, making consequential provisions following the Uganda (Amendment No. 2) Order in Council, 1961.

Relationships Commission

Report. The report of the Relationships Commission, under the chairmanship of the Earl of Munster, was published in Entebbe on June 20, 1961. The report formed the basis of the discussions at the Constitutional Conference that began in London in September, 1961. The report recommends a strong central democratic government for Uganda, with Buganda in a federal relationship, and the three other Agreement Kingdoms (Toro, Ankole and Bunyoro) in a semi-federal relationship, with the central government.

For Buganda, the commission recommends direct elections by adult suffrage to the Lukiko (parliament) and a division of powers between the Lukiko and the central legislature of Uganda, giving some exclusive power to each, but leaving the residuary power in the hands of both parliaments with the central legislature prevailing in case of conflict.

On the controversial question of Buganda representation in the central legislature, the commission recommends that Buganda should be constitutionally required to provide such representation, but that the Lukiko should be free to decide whether representatives should be chosen by direct or indirect election. The Lukiko might choose to send some of its own members if it so wished.

For Uganda as a whole, the commission's recommendations include: a National Assembly, with no *ex officio* or nominated members, to replace the present Legislative Council; universal adult suffrage and a common roll; responsible government, following British cabinet conventions; the establishment of a Council of State "to impede unfair discriminatory legislation"; and the enshrinement in the constitution of a code of human rights.

Among the principal recommendations set out in the report are the following:

1. Uganda should be a single democratic State with a strong government at the centre and with local governments on the present District basis, the exceptions being Buganda, which should stand in a federal relationship, and the three other Agreement Kingdoms (Toro, Ankole and Bunyoro), which should stand in a semi-federal relationship.

2. The law requiring direct elections to the Lukiko and specifying the franchise should be enshrined in the Uganda constitution.

The constitution should require Buganda to be represented in the National Assembly [the proposed central legislature—see below] either by direct or by indirect election, at her option. The choice should be signified by the Kabaka acting on advice after a resolution by the Lukiko.

The National Assembly should have no power to make laws on the following subjects without the consent of Buganda, signified as above:

(*a*) the Kabakaship;
(*b*) the Kabaka's government, including the public service and local government;
(*c*) the Lukiko, as to its powers and procedure;
(*d*) traditional or customary matters, to be defined.

The Lukiko should have no power to make laws conflicting with the national constitution; or laws on foreign affairs, nationality, the armed forces, the national police force; or laws about central government taxes.

On the other matters both the National Assembly and the Lukiko should have power to make laws, but in case of conflict the National Assembly's legislation should prevail.

3. The other kingdoms of Toro, Ankole and Bunyoro should have the same guarantees as Buganda for their monarchies, the constitutional powers of their rulers and ceremonies and traditions connected with their monarchies and their cultures.

The kingdoms' rights to appoint ministers should be recognised in the constitution.

Legislation passed by the kingdoms' councils should legally be by-laws, but should be called "laws."

4. The more important aspects of the local government system, including the right to appoint ceremonial heads, should be specified in the constitution.

5. The constitution should provide for the courts to decide disputes about its meaning and operation.

6. On balance, a second chamber is not recommended.

7. The commission have suggested that after independence the new Government might ask to have a British Governor-General for a period of years if only to allow time for consideration to be given locally to the question of Head of State.

8. (i) Legislative Power and Constitutional Amendment

The present Legislative Council would become the National Assembly. After independence it would become a sovereign legislature, subject to the restrictions of the constitution.

Constitutional amendments should require a two-thirds majority.

The courts of law should have power to declare unconstitutional legislation invalid.

(ii) The Franchise

Universal adult suffrage and a common roll are recommended.

The central government should maintain a single electoral register for the National Assembly, the district councils and the Buganda Lukiko.

(iii) Life of the National Assembly

The National Assembly should be elected for a five-year term, subject to earlier dissolution by the Head of State on the Prime Minister's advice.

(iv) Parliamentary Government

The constitution should provide for the resignation of the Ministry if defeated on a vote of confidence; for the post of Leader of the Opposition; and for the right of parliamentary opposition.

(v) Membership of the National Assembly

There should be no *ex officio* or nominated members. The system of "specially elected" members (corresponding to the nine "specially elected members" which the Legislative Council now itself elects) should continue for ten years, but thereafter only if the National Assembly so resolved by a two-thirds majority.

(vi) Size of the National Assembly

The National Assembly would be able, if it wished, to alter its size by constitutional amendment.

9. British Cabinet conventions should be followed.

The Head of State should exercise the prerogative powers of the Crown on ministerial advice (*e.g.*, to declare war and peace, summon and dissolve the National Assembly and make treaties).

10. A Council of State should be established. The chairman should be a judge of the High Court. Four other legal members should be appointed by the Judicial Service Commission. Another six should be appointed on the advice of the Prime Minister. Of the eleven, at least one should be a European, two Asians and one a woman. One of the Council of State's objects would be to impede unfair discriminatory legislation. It would do this by examining Bills before the National Assembly, and it would have powers to delay a Bill or to require that it should be passed by a three-quarters majority of the assembly. The council would also report publicly on the use of emergency powers.

11. The constitution should provide for the Government to take emergency powers when necessary, subject to safeguards against abuse.

12. A code of human rights should be included in the constitution.

13. A citizenship law would be necessary in the future and should be approached on a non-racial footing. Land law and the franchise should be regarded as quite separate questions.

14. Judicial and Public Service and Police Commissions should be established or continued. (Public Service and Police Service Commissions exist at present.)

15. The central government police should be preserved as a single national force.

The Chief Commissioner of Police should be established in such a position as to free him from improper political pressure.

A Police Council should be established to deal with questions of organisation, administration and other general questions relating to the force, not being questions of control of it or questions belonging to the Police Service Commission (appointment, discipline, etc.).

16. Subject to recommendations elsewhere in the report about current boundary disputes, alterations to the boundaries of the Kingdoms and districts should be regarded as constitutional amendments and should require a two-thirds majority in the National Assembly (Commonwealth Survey, C.O.I., July 4, 1961).

West Indies

Barbados

The Barbados Letters Patent (No. 2) 1961, dated June 26, 1961, amends the Barbados Letters Patent, 1914.

Federation

The talks which have been taking place at the request of the Prime Minister

of the Federation of The West Indies (Sir Grantley Adams, C.M.G., Q.C.) between him and the Secretary of State for the Colonies, were concluded on September 28, 1961.

The talks provided a valuable opportunity to review the situation and problems arising from the desire of Jamaica to leave the Federation, as expressed at the recent referendum. It was noted that, at the request of the Premier of Jamaica, a delegation of Jamaica Ministers, led by Mr. Norman Manley, would be coming to London early in October for separate discussions with Mr. Macleod on Jamaica's position.

During the talks a number of detailed problems were examined concerning the possible effect of the Jamaican decision on certain current activities of the Federal Government. It was agreed that some modification of plans in certain fields would now be called for, but the Federal Government will continue to operate in accordance with its present constitution until such time as that constitution may be modified.

It has also been agreed that it would be necessary at an appropriate time to hold a further conference along with Her Majesty's Government to consider constitutional questions affecting the Federation arising from Jamaica's expressed desire to leave it.

To this end, the Federal Government proposed to consult territorial Governments concerning the convening of a conference to discuss the situation in detail. Thereafter it might be appropriate, if the Governments concerned agreed, to arrange a conference with Her Majesty's Government early in the New Year. Meanwhile, the problems raised for the Federation as a result of the Jamaica referendum would be urgently examined.

Grenada

Colonial Report. The Report for 1957 and 1958 has been published by the Colonial Office (H.M.S.O. 58–1–22–58).

Leeward and Windward Islands

Constitutional Conference. The report of the Conference, which was held in London between June 19 and 22, 1961, has been published (Cmnd. 1434). The conference was held after the close of the West Indies constitutional conference which took place in London in May and June and at which it was agreed that consideration should be given to the amendments that would be necessary in the constitution of the Leeward and Windward Islands if the Federation of The West Indies became independent on May 31, 1962. This date was agreed by the West Indies constitutional conference and is subject to the acceptance by the territorial governments of the Federation of the proposals set out by the conference.

When the Federation of The West Indies came into being in 1958 the seven territories of the Leeward and Windward Islands were at a less advanced stage of constitutional development than Barbados, Jamaica and Trinidad and Tobago. It has long been the wish of West Indian leaders that all the territories in the Federation should be equal in status by the time the Federation achieves independence. The proposals made by the conference are designed to bring the constitutional status of these seven territories into line with that of Barbados, Jamaica and Trinidad and Tobago at the time of independence and would come into effect at that date. The main details of the report are summarised below.

There should be in each territory a Governor appointed by the Queen on the advice of the territorial Premier, given after consultation with the federal Prime Minister. The constitution should expressly set out the United Kingdom convention that the Governor should act on the advice of the Cabinet or of a responsible Minister (except where he is expressly authorised to act in some other manner).

Single chamber legislatures should be retained. There should be no change in the number of elected members in each legislature and provision should

continue to be made for two nominated members in each legislature, except in Montserrat, where provision should be made for one nominated member as at present. The nominated members should be appointed on the advice of the Premier. The principal law officer should continue to be a member of the Legislative Council and in Montserrat the Financial Secretary should continue to be an *ex officio* member of the legislature. The constitution of Montserrat should be brought into line with those of the other six territories in which there is already an elected Speaker. The present qualification for membership of the legislature, that is, that a candidate is a British subject, should be replaced by the qualification that he is a citizen of the Federation. The present powers of the Administrators to reserve for the signification of the Queen's pleasure certain categories of Bills should be removed, as well as the Queen's powers of dis-allowance in respect of legislation. The Governor should be required to act on the advice of the Premier in regard to the dissolution of the legislature except in certain restricted circumstances (to be specified in the constitution) in which he should be constitutionally empowered to act in his discretion.

As at present, the chief executive body should have the general direction and control of the government of the territory and should be collectively responsible to the Legislative Council. The chief executive body should be known as the Cabinet, and the Chief Minister should be styled the Premier. The number of elected members of the Legislative Council appointed to be Ministers (including the Premier) should not exceed 50 per cent. of the number of elected members of the Legislative Council but the new constitutions should provide expressly for a maximum of five Ministers (including the Premier) in St. Kitts-Nevis-Anguilla and for a maximum of four Ministers (including the Premier) in Montserrat. There should be no official members of the Cabinet, except in Montserrat where the Financial Secretary should continue to be a member of the Cabinet. The Governor should be required to appoint as Premier the elected member who in his view is most likely to command the confidence of a majority of the elected members. The other Ministers should be appointed on the advice of the Premier.

Powers of appointment, dismissal and disciplinary control over public officers should be exercised by the Governor on the recommendation of an Executive Public Service Commission in each territory. Special arrangements were agreed in respect of permanent secretaries, heads of departments, legal officers, the attorney-general and the principal audit officer. The members of the Public Service Commission should be appointed by the Governor on the Premier's advice, but members of the Legislative Council and serving public officers should be constitutionally debarred from membership. The conference noted with approval the administrative arrangements which already existed to facilitate the interchange of public officers between the territories and expressed the hope that these arrangements would be continued after independence and, where desired, extended. Constitutional provision will be made for appeals from decisions of the Public Service Commission in disciplinary cases to lie to the Public Service Appeals Board provided for in the federal constitution.

The present arrangement for a single supreme court, court of appeal and Judicial and Legal Service Commission to serve all the territories should be continued. Likewise, the existing provision for a single Police Service Commission to serve all the territories should be continued. The Police Service Commission should continue to be composed of one member from each territory but these members should, after independence, be appointed on the advice of the Premiers. The functions of the Police Service Commission should be extended to include the heads of the police forces as well as other gazetted and non-gazetted ranks which they at present cover.

The post of principal law officer should continue to be filled by a public officer, and in each territory he should be styled the Attorney-General. The Attorney-General should be appointed by the Governor on the advice of the Judicial and Legal Service Commission, after consultation by the Commission

with the territorial Premier concerned. Special provisions in the constitution should safeguard the position of the Attorney-General with regard to his removal from office and his salary. The Attorney-General should retain his present exclusive powers with respect to the initiation, continuance and discontinuance of criminal proceedings, in the exercise of which he is not subject to the direction or control of any other person or authority.

The principal audit officer should be appointed by the Governor on the advice of the Public Service Commission, after consultation with the federal Auditor General and the territorial Premier concerned. His position should be specially safeguarded in the constitution by provisions similar to those agreed in respect of the Attorney-General. The constitution should continue to require the accounts of government departments, of the Public Service Commission, of subordinate courts and of all other offices and authorities of the territory to be audited annually by the principal audit officer: and in exercise of these functions the principal audit officer should not be subject to the direction or control of any other person or authority.

Emergency powers should, after independence, be exercised by the respective Governors on ministerial advice. The constitutions to be introduced on independence should provide for the relevant Emergency Powers Order in Council to lapse in respect of each territory on January 1, 1964, or such earlier date as the legislature of the territory may provide. This arrangement would give each legislature approximately a year-and-a-half after independence in which to consider the replacement of the Emergency Powers Order in Council by suitable local legislation.

At present the powers of the Queen to legislate by Order in Council in respect of Antigua, Montserrat and St. Kitts-Nevis-Anguilla are limited. Because of this, some of the constitutional provisions of these territories are enshrined in Letters Patent, while others (including important provisions concerning legislatures, the police and the public service) are contained in local legislation. The conference agreed that it would be desirable for the new constitutions of these three territories to be contained in Orders in Council in the same way as for other units of the Federation: and it was recommended that to this end steps should be taken to confer the necessary powers upon the Queen in Council by Act of Parliament.

The passage of any Bill amending a territorial constitution should require a two-thirds majority of all the members of the Legislative Council. The passage of a Bill amending the more important provisions of a territorial constitution should require a two-thirds majority of all the members of the Legislative Council in two successive sessions, with a dissolution intervening. The federal constitutional conference earlier in June singled out a limited number of provisions of the territorial constitutions for amendment of which the approval of the federal House of Representatives would also be required. It was agreed at the Leeward Islands and Windward Islands conference that all such provisions should be subject in the territories to the procedure outlined above for amendments to the more important provisions of the territorial constitutions. The particular provisions to be included under this procedure should be settled in consultation between the legal draftsmen and the Government of each territory. Special arrangements were agreed respecting the procedure for amending joint constitutional instruments which apply to several territories, such as the Windward Islands and Leeward Islands (Courts) Order in Council, 1959 (Commonwealth Survey, C.O.I., August 1, 1961).

St. Lucia

The St. Lucia (Validation of Elections) Order in Council, 1961, dated August 2, 1961, provides that no election held before the date of the Order of a person to be a member of the Legislative Council shall be invalid by reason only that the statutory declaration of the qualification of that person delivered to the returning officer was in the form prescribed by the First

Schedule to the Legislative Council (Elections) Ordinance, 1951, as originally enacted, instead of in the form prescribed by that Schedule as in force at the date of the election.

Trinidad and Tobago

Colonial Report. The Report for 1957 has been published by the Colonial Office (H.M.S.O. 58–1–45–57).

Constitution. The Trinidad and Tobago (Constitution) Order in Council, 1961, has been made.

The purpose of this Order is to provide a new Constitution for Trinidad and Tobago, conferring full internal self government within the framework of the Federation of the West Indies. It includes provision for the office of Governor, the Legislature, the Supreme Court and the Public Service (S.I. 1961 No. 1192).

Royal Instructions, dated June 26, 1961, have been given to the Governor of Trinidad and Tobago, to make consequential provisions following the Trinidad and Tobago (Constitution) Order in Council.

Western Pacific

Courts

The Western Pacific (Courts) Order in Council, 1961, provides for the continuation and reconstitution of Her Majesty's High Commissioner's Court for the Western Pacific under the new style of the High Court of the Western Pacific with the powers and jurisdiction appropriate to a Superior Court of Record. The summary jurisdiction of Deputy Commissioners under the former constitution of the Court are retained, under the provisions of this Order, until such time as legislation is enacted in the territories concerned for the constitution of magistrates' courts with civil and summary criminal jurisdiction (S.I. 1961 No. 1506).

Zanzibar

Geneva Conventions

The British Protectorate (Geneva Conventions) (Amendment) Order in Council, 1961, amends the British Protectorates (Geneva Conventions) Orders in Council, 1917 and 1937, so that they cease to apply to the Zanzibar Protectorate (S.I. 1961 No. 1500).

High Court

The Zanzibar Order in Council, 1961, makes fresh provisions for the appointment of Judges of the High Court of Zanzibar and for the tenure of their office; and safeguards the salaries and terms of service of the British Resident and the Judges of the High Court (S.I. 1961 No. 1507).

BOOK REVIEWS

THE LAWYERS AND THE CONSTITUTION. By S. A. DE SMITH. [The London School of Economics and Political Science: G. Bell and Sons. 1960. 38 pp. 3s. 6d.]

A LONGER and more accurate title for this inaugural lecture by the professor of public law at the University of London could be, he suggests, "Some reflections on the study of the constitutional and administrative law of England and the constitutional laws of the Commonwealth." He has offered us most interesting and trenchant reflections on all these topics, but they are by no means random or disconnected. They are held together by one important link, among others, and that is, in the author's view, their relative neglect as fields of study by lawyers in England. There have been distinguished exceptions, and, of two of the most distinguished, one is and one was associated with the London School of Economics—Professor W. A. Robson in administrative law and Sir Ivor Jennings in constitutional law. But there is a good deal of truth in Professor de Smith's assertion that constitutional law has "failed to achieve parity of esteem with certain other branches of legal study in England. The ranking lists of most academic lawyers would show the law of contract, the law of tort and land law in higher places" (p. 7). In the United States, on the other hand, and in many countries of the Commonwealth, particularly in Australia, Canada and India, constitutional law and constitutional lawyers have very high standing.

What is the explanation? One reason may be crudely expressed by saying that in Britain there is no money in it. Professor de Smith expresses it better when he says "that the adoption of a written constitution, providing generous opportunities for judicial review of legislation, would revolutionise the study and transform the status of constitutional law in this country. Great issues of state would be determined in a judicial forum, and the attention of newspaper readers would be diverted from the work of the criminal courts to the drama of the latest constitutional case. Fortunes would await the specialist practitioners of constitutional law. The university courses would devote a second year to the subject" (p. 10). This is a big price to pay and we may feel pretty certain that it will not be paid. Englishmen will still believe that happy is the country which has no constitution and no constitutional lawyers.

Yet changes may come through development in the scope and status of administrative law. Professor de Smith regards constitutional law and administrative law as occupying distinct provinces, but also a substantial area of common ground (p. 16). He believes that the study of administrative law in England is just passing into adolescence. It got off to a bad start for it aroused the fears and hostility in its early days of conservative individualists, "who have always been strongly represented in the ranks of the legal profession" (p. 22). He thinks that these obstacles will not easily be overcome, but he gives us good reasons why an attempt should be made. It seems to me that he may be a little over pessimistic here, though it is a debatable matter. Legal representation before tribunals is, since the report of the Franks Committee, more generally permitted; the Lands Tribunal provides scope for practitioners of the highest quality in very important fields of administrative law (as Professor de Smith acknowledges). The trend may be towards a better world for administrative lawyers. This, too, may be a big price to pay for the advance in status of the subject of administrative law.

In the concluding portion of his lecture Professor de Smith turns to discuss constitutional law in the countries of the Commonwealth. As he says, "in

relations between the independent members of the Commonwealth there is precious little for the lawyer to bite on" (p. 31). But there is a large and fascinating field of study for the public lawyer in the constitutions of the Commonwealth countries themselves for, as he says, in the last fourteen years the legal advisers of the Colonial Office have produced more constitutional instruments than Latin America has thrown up in a century. In this field Professor de Smith has already shown himself a distinguished worker. In his choice of subjects and in his treatment of them he provides an example which we may hope will be followed. His lecture should stimulate not only thought and discussion about these very important fields of public law, but also some valuable writing which will instruct and illuminate. From such work, incidentally, the political scientist will have much to learn. In England, as Professor de Smith says, "the constitutional lawyer and the political scientist are for ever undivided" (p. 5). It is, of course, an exaggeration to say that political science without constitutional law is blind, and constitutional law without political science is empty, but it is only an exaggeration.

K. C. WHEARE.

MALAYA AND SINGAPORE: THE BORNEO TERRITORIES. By L. A. SHERIDAN with specialist contributors. Vol. 9, *The British Commonwealth* series. [London: Stevens & Sons, 1961, xxiii and 510 pp. £4 4s. net.]

THE *British Commonwealth* series is now well established, and over the past decade volumes have been published, under the general editorship of Professor Keeton, which cover the United Kingdom, Australia, New Zealand, Ceylon, India, Pakistan and South Africa (though whether any future second edition of the last-named volume will ever be possible may be doubted in view of South Africa's departure from the Commonwealth). Now we have a book which deals, in fact, with nearly all the Commonwealth areas of the Far East: if we leave out of account the various Pacific and Indian Ocean islands dependent upon the United Kingdom or other Commonwealth countries, only Hong Kong would seem to be left. The series here breaks new ground, because this is the first of the books to cover non-independent territories as well as full members of the Commonwealth. North Borneo and Sarawak are Crown colonies, Brunei is a protected state, and Singapore, though very near to complete independence, is not yet quite there. The grouping of countries chosen for this volume is happy, partly because the laws surveyed have much in common, and partly also because it has very recently appeared that the Prime Ministers of the Federation of Malaya and of Singapore have agreed to work towards a federation of the two territories, and also ultimately, if possible, towards a larger federation with the Borneo Territories. In one respect the present volume may prove to be of even greater importance than its predecessors in the series. Readers of the *Journal of the Society of Public Teachers of Law* may remember the urgent note struck in the June 1960 number by Professor Sheridan, Mr. Calvert and Mr. Coomaraswamy (both the latter being among the specialist contributors to this book) in pointing out the lack of published material, and in particular of textbooks, upon Malayan law. This point is again made by Professor Sheridan in his Preface to the present work, and he expresses the hope that the book may be the forerunner of many more treatises. Whether or not this hope is met there is no doubt that this volume at least is of great value, and Professor Sheridan and the other contributors are all to be congratulated on the step forward which has been achieved by its production. The editor in particular has put considerable effort into the work, and he has himself written no less than seven out of the sixteen chapters. The resulting whole is an admirable and fluent exposition of the laws of all the territories, amounting in all to sixteen systems, when the eleven constituent States of the Federation of Malaya are counted in. This is a well integrated account of the developing law, which will be valuable both in law teaching and for use in the work towards a later and larger federation.

After an introductory chapter the book is divided into three parts, dealing respectively with Constitutional Development, Public Law and Private Law. Part One will be of most interest for English readers, though Parts Two and Three will be useful as reference works on the shelves of all lawyers interested in comparisons between Commonwealth laws—not to mention their value for local lawyers, teachers and students. The four chapters in Part One deal with the Federation of Malaya Constitution, the States of the Federation, the Singapore Constitution, and the Borneo Territories. The first of the chapters shows Malaya to be on the whole an orthodox federation, with the residue of power in the States, while the chapter on the States themselves contains a fair amount of information which is esoteric by English standards, but nevertheless fascinating. The chapter on Singapore is short but pithy. The 36-page chapter on the Borneo Territories is different from its predecessors in that it is not limited to the subject of constitutional development. Mr. Hickling, who wrote the chapter, has gathered practically all the material used upon all aspects of the laws of the territories into the one chapter, which is thus by itself a lucid and remarkably short account of the laws of three countries. The rest of the book apart from this chapter is therefore left free for material on Malaya and Singapore, but surely this isolation of the Borneo material should have been made clear either in the Preface or in the Introduction. As it stands, the title to Part One of the book is misleading.

It would seem unnecessary here to comment at any length upon Parts Two and Three of the book, though in Part Two (Public Law) it is interesting to find a Singapore case of 1936 which conflicts with the later English decision of *Franklin* v. *Minister of Town and Country Planning*; Professor Sheridan, however, doubts whether the Singapore case can stand in view of *Franklin* (pp. 168–169). Part Three (Private Law) is the largest portion of the book, though Chapter 11 on Tort only amounts to three pages! It seems that the English law of torts has been transported wholesale into Malaya and Singapore, with very few statutory exceptions. Not so the law of contract, which, in Chapter 12, is covered in 74 pages, though even here Malaya and Singapore have much in common with England. Indeed the contract law of the Straits Settlements was based upon the law of England in the early nineteenth century.

The book is completed with the usual tables and index, together with maps, and population and chronological tables, and it is excellently produced. But perhaps one matter of editorial policy might be questioned. Despite the dearth of earlier published matter, Professor Sheridan has managed to include a bibliography at the end of five of his seven chapters. He does not, however, do this for his Chapters 6 (The Judicial Systems and Legal Professions) and 16 (Industrial Law), though he quotes some law journal articles in footnotes in Chapter 6. Four of the other five contributors fail to provide bibliographies, though they sometimes refer in footnotes to such published works as there are, while Mr. Chua, who contributed Chapter 14 (Domestic Relations) manages to set out a half-page bibliography. It may be that the four-page bibliography set out at the end of Professor Sheridan's introductory chapter (pp. 40–44) is intended to cover such material as exists for some of the later chapters, though, if this is so, there is some duplication between that list and Mr. Chua's list. Whatever the policy, perhaps it might have been made clear. But, at all events, this is a minor matter and cannot detract from a book which is clearly destined to be of great importance.

D. C. M. YARDLEY.

INDEX

Aden,
  colonial report, 315
  constitutional progress, 204, 429
Advisory Committee on Scientific Policy, 77
Agricultural Land Commission, 89, 290
Agricultural Research Council, 292
Agricultural Research Fund, 182
Air Transport Advisory Council, 88
Aliens, 181
Ancient Monuments Boards, 309
Australia,
  appeals to Privy Council, 340–348

Bahamas, 205
Barbados, 316, 439
Basutoland, 95, 205
B.B.C., 95
Bechuanaland, 95, 205, 316
Bermuda, 97
Blood Commission, 100, 209
Board of Control, 90
Book reviews, 114, 223, 331, 444
British Guiana, 205, 429
British Honduras, 97
British Phosphate Commission, 421
British Solomon Islands, 97

Cameroons, 98, 206, 316, 429
Canada, Bill of Rights, 1–6
Colonial Development Corporation, 95, 313
Commonwealth and Dependent Territories,
  colonial development, 95, 203, 428
  colonial research, 95
  colonial territories, 314
  current survey, 95–113, 203–222, 313–330, 428–443
  diplomatic immunities, 203, 428
  European Economic Community, 315, 429
  legal education, 203, 429
  privy council, 315
Council on Tribunals, 95, 121–128, 202, 312, 425
Courts. *See also* under particular courts.
  criminal courts, 180
  judicial appointments and salaries, 75
Courts—*cont.*
  Lancashire Quarter Sessions, 289
  legal aid and advice, 75, 180, 289, 398
  legal proceedings against justices, 180
  metropolitan magistrates, 75
  statistics, 398
Crown lands, 398
Crown liability,
  Crown Proceedings Act, 45–74
  servant's dismissibility, 76
Cyprus,
  British nationality, 99, 207
  Commonwealth membership, 207
  diplomatic immunities, 430
  Sovereign bases, 207

Delegated legislation, 45–74
Department of Scientific and Industrial Research, 292
Department of Technical Co-operation, 291, 400

East Africa High Commission, 317, 430
Education,
  Central Advisory Council, 180
  debate, 76, 399
  education for management, 180
  higher education, 181
  Scotland, 290, 399
  superannuation, 290, 399
  technical education, 181
  universities, 76, 181, 290
  youth service, 76
European Free Trade Area,
  diplomatic immunities, 290

Falkland Islands, 207
Fiji, 207, 318, 430
France,
  Constitution of 1958...386–397

Gambia, 207, 318, 430
General Nursing Council, 312, 427
Ghana,
  Judicial Committee, 99
Gibraltar, 99, 319
Gilbert and Ellice Islands, 208
Government Functions,
  agriculture, 181, 290
  aliens, 181

Government Functions—*cont.*
control of public expenditure, 399
defence, 182
diplomatic immunities, 290
education, 401
health, 76, 401
Home Office, 230–255
housing and local government, 401
Inland Revenue Commissioners, 182
inspectorate, 291, 399
Ministers,
functions, 76, 182, 291, 400
parliamentary secretaries, 76
passing of the Ministry of Transport and Civil Aviation, 150–164
pensions and national insurance, 401
post office, 76
research, 77, 182, 292
security, 292
Grenada, 440

Herring Industries Board, 309
Highways,
access, 77, 182
new Act, 401
private street works, 77, 292
Historic Buildings Council, 309
Home Office,
provincial police, 230–255
Hong Kong, 319
House of Commons. *See* Parliament.
House of Lords. *See* Parliament.
Housing,
debate, 77, 182, 403
house purchase, 293
local authority housing, 183
returns, 78, 184, 293, 403
summary, 78, 184, 293, 403

India,
public corporation in, 362–385
Indian minorities,
cultural and education rights, 271–288
Inquiries,
air, 78, 184, 403
railways, 78, 184, 293, 403
International Tin Council,
diplomatic immunities, 291
Iron and Steel Board, 309
Iron and Steel Holding and Realisation Agency, 90, 198, 421
Israel, By-laws, 6–7
I.T.A., 95, 313

Jamaica, 319, 431
Justices of the Peace, selection of, 134–149

Kenya,
constitution, 100, 208, 319, 431
release of Kenyatta, 432
Kuwait, 432

Lancashire Quarter Sessions, 289
Leeward and Windward Islands, 330, 440
Legal aid and advice, 75, 180, 289, 398
Local Government. *See also* Housing, Town and Country Planning, etc.
allowances, 403
clean air, 404
consumer protection, 404
economic situation, 404
elections, 293, 405
estoppel, 294
finance, 78, 184, 294, 406
grant, 78
home safety, 294
housing, 183
Justice of the Peace, selection of, 134–149
liability to repair, 186
Local Government Commission, 294, 407
London, 79, 256–270, 295, 408
meetings, 81, 295
pecuniary interests of councillors, 297
police,
appointment of chief constable, 340–342
dismissal of chief constable, 297, 342–346
Judges' Rules, 186
metropolis, 409
pensions, 297
police federation, 409
provincial police, 1856–1870... 230–255
Royal Commission, 82, 409
public health, 409
rating and valuation decisions, 79, 184, 294, 406
rivers, 411
rural water supplies, 298
Scotland, 298, 412
superannuation, 298
London,
Reform of London Government, 256–270
Royal Commission, 79, 295

Magistrates, selection of, 134–149
Malta,
Blood Commission, 100, 209, 319
electoral provisions, 432
magistrates, 100

Mauritius, 211, 319, 432
Ministry of Transport and Civil Aviation, the passing of, 150–164
Monckton Commission, report, 101
Monopolies. *See* Restrictive Practices.
Monopolies Commission, 82, 187, 412

National Assistance Board, 310
National Film Finance Corporation, 310
National Health Service,
accounts, 187
Central Health Services Council, 414
contributions, 299
costs, and charges, 187, 299
debate, 414
hospital service, 300
mariners, 300
meetings, 300
regional hospital boards, 189
remuneration, 83
Scotland, 189, 300
Scottish Health Services Council, 190
superannuation, 414
National Insurance,
accounts, 301
benefits, 190
classification, 190
contracting out, 83
contributions, 83, 301
decisions,
absence from Great Britain, 190, 415
apprenticeship, 301
approved form of claim, 84
cessation of contributions to child's maintenance, 190
earnings, 84
good cause for breach of rule of behaviour, 191
incapable of work, 84, 415
late claim, 415
local tribunals, 191
married women, 191
maternity allowance, 415
Minister's question, 415
misconduct, 416
normal course of working, 191, 301, 416
normal idle day, 84
notice of prior de-retirement, 302
prescribed manner of claiming, 191
resident together, 191
National Insurance—*cont.*
decisions—*cont.*
retired from regular employment, 84, 416
seasonal worker, 84, 191, 302
share fisherman, 192
short working week, 84, 192
sickness benefit, 416
trade dispute, 84, 417
whether unemployed, 85
Germany, 417
mariners, 192
married women, 193
modification of Superannuation Acts, 85
National Insurance Act, 1960...85
non-participation, 85, 193, 302, 417
pensions increments for wives and widows, 302
report, 303
retirement benefits, 303
Turkey, 303
National Insurance (Industrial Injuries),
benefits, 193
colliery workers, 303
debate, 417
decisions,
carbon-monoxide poisoning, 86
carcinoma of kidney, 86
coronary disease, 193, 304
death benefit, 417
dermatomycosis of feet, 193
disease contracted before relevant accident, 418
disfigurement, 418
essential hypertension, 193
" family fund," 193
greater disabilities, 418
heat stroke, 304
late claim, 418
loss of faculty, 418
medical appeal tribunals, 418
osteomyelitis, 194
" out of and in the course of employment," 86, 194, 419
" paired organs," 419
post-war credits, 419
prescribed disease, 304
prolapsed intervertebral disc, 87
special hardship allowance, 87, 194, 419
suicide due to accident, 87
tuberculosis—not prescribed re health visitor, 195
tuberculosis of the spine, 87
unemployability supplement, 195
widow's pension, 87

National Insurance (Industrial Injuries)—*cont.*
insurable and excepted employments, 195
prescribed diseases, 304
Report, 304
National Research Development Corporation, 182
Nationalised Industries,
airways, 88, 195, 306, 419
atomic energy, 306, 419
coal, 196, 306, 419
debate, 87, 195
electricity, 88, 196, 306, 420
finance, 305
gas, 88, 196, 306, 420
transport, 88, 196, 307, 420
New South Wales,
referendum to abolish Upper House, 131–133
New Towns, 90, 199, 421
Commission, 310, 421
Nigeria, 100, 320
North Borneo, 100, 211
Nyasaland. *See under* Rhodesia and Nyasaland.

Organisation for Economic Co-operation and Development,
diplomatic immunities, 291

Papua-New Guinea, 100
Parliament,
Consolidation Bills, 307
House of Commons,
closure, 197
control of expenditure, 89
Estimates Committee, 89, 197, 307, 420
members' fund, 197, 308
privilege, 89, 198, 308, 421
Public Accounts Committee, 89, 198, 309, 421
House of Lords,
joint select committee, 307
offices, 197, 308, 421
procedure, 421
Parliamentary Commissioner, 308
Prerogative of dissolution, 165–179
Prerogative of Mercy, 8–25, 197
Royal Assent, 89, 198, 309, 421
Tasmanian precedents, 165–179
Wedgwood Benn case, 349–361, 420
Patents Appeal Tribunal, 313
Police,
appointment of chief constable, 340–342
dismissal of chief constable, 297, 342–346
Police—*cont.*
inspectorate, 400
Judges' Rules, 186
metropolis, 409
police federation, 409
provincial police, 1856–1870...230–255
Royal Commission, 82, 409
Post Office, 76, 291
Prerogative of Mercy, 8–25
Public Authorities. *See under* particular Authorities.
Public Works Loan Board, 422

Remedies,
Certiorari, 90, 199
Habeas Corpus, 90
Injunction, 91, 199
Restrictive Trade Practices,
court decisions, 82–83, 187, 298–299, 413–414
restrictive trading agreements, 187
Rhodesia and Nyasaland,
Barotseland, 320
debate, 211
Federal Review Conference, 109
Monckton Commission, report, 101
Northern Rhodesia, 109, 211, 320, 435
Nyasaland, 110, 215, 435
Southern Rhodesia, 110, 216, 321
Romer Committee, 225–229, 292
Royal Fine Art Commission, 310

St. Kitts, 218
St. Lucia, 442
St. Vincent, 218
Sarawak, 218, 436
Scotland,
advertisement control, 200
agriculture, 181
courts, 75, 180, 398
education, 290, 399
housing, 78, 403
legal aid, 75, 180, 398
local government, 78, 298, 412
National Health Service, 189, 300, 414
town and country planning, 92, 311
tribunals, 428
Scottish Health Services Council, 301
Security,
Romer Committee, 225–229, 292
Separation of Powers, 45–74
Services, Press, and Broadcasting Committee, 225–229
Seychelles, 110
Sierra Leone, 110, 218, 321, 436

Somaliland, 110
South Africa,
application of U.K. law, 326
constitution, 218
debate, 111
membership of the Commonwealth, 219
referendum, 111
United Nations, 326
South-West Africa, 219
Subordinate Legislation,
House of Commons Committee, 91, 200, 310, 422
House of Lords Committee, 91, 200, 311, 422
Sugar Board, 199, 422
Swaziland, 205, 436

Tanganyika, 111, 219, 327, 436
Tasmania,
dissolution of Parliament, 165–179
Tonga, 437
Town and Country Planning,
accounts, 200
advertisement control, 200
agricultural land, 91
appropriation of land, 201
atomic energy establishments, 422
building preservation order, 422
caravan sites, 311
compensation, 201, 311, 423
compulsory purchase, 201, 423
development notice, 92
enforcement notice, 92
grants, 92
national parks, 311
notice of inquiry, 93
Oxford traffic inquiry, 311, 424
permission, 93
planning appeals, 121–128, 311, 424
planning permission, 424
Scotland, 92, 93, 200
use classes, 93, 424
war damage, 201
Trades Disputes Act 1906, 128–131
Transport,
inquiries, 78, 184, 293
Tribunals and Judicial Functions of Ministers,
Agricultural Land Tribunal, 93, 425
Council on Tribunals, 95, 121–128, 202, 312, 425
departmental inquiries and *sub judice* rule, 312
disciplinary bodies, 94, 312, 427
licensing authorities, 428
National Health Service Tribunal, 428
Patents Appeal Tribunal, 313
revenue tribunals, 202
rules of procedure, 95
Scottish Land Court, 428
Trinidad and Tobago, 112, 443

Uganda,
Buganda constitution, 112, 220
Colonial report, 437
Constitutional changes, 221, 437
deputy Governor, 437
Relationships Commission, 112, 327, 437
United Kingdom,
current survey, 75–95, 180–202, 289–313, 398–428

Wales,
education, 76
Water resources, 313
West Germany,
federalism, 26–44
West Indies,
Barbados, 439
constitution, 113, 222, 328, 439
Grenada, 440
Leeward and Windward Islands, 330, 440
St. Lucia, 442
Trinidad and Tobago, 443
Western Pacific, 443
White Fish Authority, 199, 310
Wireless and Television,
B.B.C., 95
I.T.A., 95, 313

Youth Service, 76

Zanzibar, 113, 222, 443

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